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THE

AMERICAN LAW REGISTER.

JANUARY 1879.

THE TAXATION OF BONDS OR STOCK OF FOREIGN STATES, MUNICIPALITIES AND CORPORATIONS.

I. ARE bonds or obligations of other states, and of municipal corporations incorporated by other states, commonly called the stock or debt of such states and municipalities, subject to valuation and assessment by the state in which the holder of such bonds or obligations may reside?

The basis of our systems of state taxation is the fundamental rule that every person in a state, or person holding property therein, ought to contribute his proportion of public taxes for the support of the government, according to his actual worth in real and personal property.

The principle, which must be deduced from this rule, is that immovable properties within a state are subject to valuation and assessment in such state, whether such property be owned by residents or non-residents; and that movable properties, owned by residents of such state, follow the persons of their respective owners, and must be accounted part of the property by which the actual worth of such owners shall be measured.

This principle is a rule of public law: 2 Domat's Civil Law, by Strahan, 2 ed. 330; Story Conf. Laws, 3 ed., §§ 379, 380, 381; *Sill v. Worswick*, 1 H. Black. 690; *Freke v. Lord Carberry*, Law Rep. 16 Eq. Cas. 466, Lord SELBORNE.

The words "movable properties," used by the continental writers, are now recognised as the fitting term by which to distin-

guish those properties which follow the person, and are, therefore, "movable" from those properties, which, though treated by a local law as personal estate, are yet, as matter of fact, *immovable*, because, being an interest in lands, "they savour of the realty." *Freke v. Lord Carberry*, Law Rep. 16 Eq. Cas. 466, 467.

It certainly cannot be reasonably doubted that state and municipal bonds, bearing interest, belong to the class of movable properties. "States and cities when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons." *Murray v. Charleston*, 96 U. S. 445. See also *U. S. Bank v. Planters' Bank*, 9 Wheat. 907. Their obligations are simply evidences of debt, due from such states and cities to the holders of such obligations. Such bonds are, undoubtedly, property in the hands of those who hold and own them: *State Tax on Foreign-held Bonds*, 15 Wall. 320. If they are property in the hands of those who hold and own them, they have, as property, no other *situs* than the residence of such holders and owners: *State Tax on Foreign-held Bonds*, 15 Wall. 323.

Such securities show the right of the persons owning them to demand payment of the interest thereon, as it may accrue and become payable, and of the principal, when it shall become due according to the terms of the respective contracts: Williams on Personal Property, 4th Am. ed. 4. These rights are properties belonging to the owners of such securities: *State Tax on Foreign-held Bonds*, 15 Wall. 320; *Murray v. Charleston*, 96 U. S. 445. They are properties, having a value in the market while the interest is maturing and before the debts are due. They are properties, which, because they consist of the right of their respective owners to demand such interest and principal, as they may respectively become due, are personal to such owners; and have, as such rights, no taxable *situs*, except the residences of their respective owners: Cooley on Taxation 65; Burroughs on Taxation, secs. 41, 134, 432; *Latrobe v. Mayor and City Council of Baltimore*, 19 Md. 22; *Mayor and City Council of Baltimore v. Sterling and Ridgely*, 29 Md. 49; *Champaign County Bank v. Smith*, 7 Ohio 52, 54; *Hall v. County Commissioners of Middlesex*, 10 Allen 102; *Webb v. Burlington*, 28 Vt. 198; *Kirtland v. Hotchkiss*, 42 Conn. 426, 435.

It does not matter that by the terms of the contracts the owner of such securities is obliged to demand payment in a state other than that in which he may reside. It does not matter that he is required, by the terms of the contracts, to assign these securities in a particular manner, or that the registry of such assignment is required to be made or kept in a particular place. Such conditions do not alter the situs of the right of property, or separate such properties from the person of the owner of them. They are only precautions, intended for the greater safety of the debtor: *Black v. Zacharie*, 3 Howard 513; *Farmers' Bank of Maryland v. Iglehart*, 6 Gill 56; *Baltimore City Passenger Railroad Co., v. Sewell*, 35 Md. 252, 253.

Such bonds may be securities, which are of record as the property of the owner thereof, in the proper offices of the states and corporations by which such bonds were executed; but the title to the bonds does not depend upon the register only. Each of such owners has actual possession of his bonds. Each of said owners is competent to sell, bequeath, or give them away as part of his estate. They are not subject, in any wise, to the taxing jurisdiction of the states under whose authority they were issued, as the property of such owners; because such owners are not within the jurisdiction of those states: *Murray v. Charleston*, 96 U. S. 445. They are taxable only under the laws of the state in which their owner may reside.

It is true that the Supreme Court, in the case of *State Tax on Foreign-held Bonds*, 15 Wall. 323, 324, said: "That the actual situs of personal property, which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the state in which it may be taxed. The same thing is true of public securities, consisting of state bonds, and bonds of municipal bodies; and circulating notes of banking institutions; the former, by general usage, have acquired the character of, and are treated as, property *in the place where they are found*, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages, and debts generally, has no situs independent of the domicile of the owner."

We do not understand what is meant by the words that state bonds, and bonds of municipal bodies, by general usage, "have acquired the character of, and are treated as property, in the place

where they are found, though removed from the domicile of the owner."

It will be observed that the Supreme Court does not say that such bonds are not to be treated as property, at the domicile of their owner, *when they are found at such domicile*. It certainly did not mean to say that they could be treated as property *only* in the state or municipality by which such bonds were issued; for while in *Murray v. Charleston*, 96 U. S. 445, it decided that the promise of a state or municipality *was* property, it held on page 440, *that non-resident holder of such state or municipal promises, was not a holder of property within such state or city*. If such non-resident holder of state or city bonds is not a holder of property in the state or city issuing such bonds, he must certainly be accounted the holder of such property at his domicile in the state in which he resides. And, as the Supreme Court, in its opinion in *Murray v. Charleston*, *supra*, expressly limits the taxing power of a state or city over debts due by such state or city, *to creditors within their respective jurisdictions*, it must certainly be understood to have meant that the taxing power of other states, and of municipalities in other states, extended to such properties, when owned by creditors residing within *their* respective jurisdictions. In such cases the property is found at the domiciles of the owners of the particular properties.

As a question of strict law, it is immaterial whether bonds, issued by one state, or by a municipality incorporated by one state, and owned by a resident of another state, were or were not exempted from taxation by the state which authorized the issue of such bonds. Such exemption can have no extra-territorial operation, except by general usage, or by a comity, which has attained the force of general usage.

There is, of course, no need of any argument to show that the bonds of other states, or of municipal or other corporations incorporated by other states, owned by residents of one state, are not exempted from taxation by such state, because such bonds are not taxed by the states which authorize their issue, when owned by residents of such states. Each state is free, in the absence of a constitutional provision to the contrary, to exempt from taxation any class of property belonging to residents of such state to which it may see proper to grant such immunity. The power thus exercised can never operate beyond the jurisdiction of the state exer-

cising it. No state can protect from taxation property within the jurisdiction of another state, owned by a resident of such other state.

II. Are shares of stock in corporations, other than municipal corporations, not incorporated by the state in which the holder of such shares resides, subject to valuation and assessment by the state of which such holder is a resident?

A corporation, incorporated by another state, is a resident of such state only: *Bank of Augusta v. Earle*, 13 Peters 588; *Ohio and Mississippi Railroad Co. v. Wheeler*, 1 Black 295-297; and must be treated as a natural person would be, who resided in such state: *Louisville Railroad Co. v. Letson*, 2 How. 555.

It is the sole owner of the franchises and capital of the corporation, and of the property, real, personal and mixed, in which that capital is invested, and which are held in its corporate name and by its corporate title; and such property, according to its nature, may be valued and assessed to the corporation owning it, in the state in which such corporation resides, in the same manner in which such particular properties would be assessed to individuals, if they were the owners thereof: *Gordon v. Appeal Tax Court*, 3 How. 150; *Calcutta Jute Mills Co. v. Nicholson*, Law Rep. 1 Ex. Div. 444, 448; *Cesena Sulphur Co. v. Nicholson*, Law Rep. 1 Ex. Div. 453, 454.

If such corporation has a capital stock, divided into shares, owned by individuals, such individual shareholders are not the owners of any portion of the corporate property or franchise: *Regina v. Arnaud*, 9 Ad. & E. N. S. 806, 817 (58 E. C. L. R. 816); *Watson v. Spratley*, 10 Exch. 35, 238; *Cesena Sulphur Co. v. Nicholson*, Law Rep. 1 Exch. Div. 451; and certainly the corporation is not the owner of the shares belonging to the individual shareholders.

The shareholders have a right to participate in the net profits of the corporation, as ascertained from time to time, in proportion to the number of their shares in the corporate stock. They have a right, in case of the dissolution of the corporation, to a share in its assets remaining after payment of its debts, proportioned to their ownership of its shares of stock. But, while the corporation remains in being, they are not owners of any part of the corporate franchises or property: *McCulloch v. Maryland*, 4 Wheat. 436; *Dartmouth College v. Woodward*, 4 Wheat. 700, 701; *Gordon*

v. Appeal Tax Court, 3 Howard 150; *Van Allen v. Assessors*, 8 Wall. 584; *Delaware Railroad Tax Case*, 18 Wall. 229, 231; *Farrington v. Tennessee*, 95 U. S. 686, 687, 691; *Dewing v. Perdicaries*, 96 U. S. 196; *Regina v. Arnaud*, 9 Ad. & E. N. S. 806, 817 (58 E. C. L. R. 816); *Watson v. Spratley*, 10 Exch. 235, 238. The right, while the corporation remains in being, to receive their proportionate share of the net profits of such corporation, is their sole and exclusive right. It is not shared with the corporation. It belongs to the stockholders as stockholders only. This right is an actual property, having a market value, which, whether it is to be termed a chose in action or not, is as much the exclusive property of the shareholders as any other property belonging to him. *Ex parte Union Bank of Manchester*, 12 Eq. Cas. 357; Williams on Personal Property, 4th Am. ed. 6.

The property, owned by a shareholder in a corporation, is so different and distinct from the property owned by the corporation, that its distinctive character is not affected by the nature of the property of the corporation. The property of the corporation may be wholly real estate. The shares of its stock are personal property only: *Ex parte Union Bank of Manchester*, 12 Equity Cases 357; Shelford on Joint Stock Companies, 2 Eng. ed. 147; *Myers v. Peregal*, 2 De Gex, Mac. & Gord. 618, 621; *Hilton v. Giraud*, 1 De Gex & Smale 83; *Ashton v. Lord Langdale*, 4 De Gex & Smale 402; *Taylor v. Linley*, 2 De Gex, Fisher & Jones 84; *Hayter v. Tucker*, 4 Kay & Johnson 243; *Sparling v. Parker*, 9 Beav. 450; *Walker v. Milne*, 11 Beav. 507.

The necessary conclusion would seem to be that shares in a corporation, incorporated by one state, owned by residents of another state, constitute a separate and special property, belonging to the respective shareholders, wholly distinct from the capital of the corporation, and from the property in which that capital is invested: *Emory v. State*, 41 Md. 58.

The most complete proof that the property belonging to the corporation, and the shares in such corporation in the hands of the holders of such shares, are distinct and separate properties, is the conclusion reached by the Supreme Court of the United States in the recent case of *Farrington v. Tennessee*, 95 U. S. 687, that the property of a corporation and the shares of a corporation may both be taxed in the hands of their respective owners, by the state in which such corporation has its situs, and in which also such

shareholders reside, and that such taxation is not double. In that case it was declared to be "settled beyond doubt," that a tax upon a corporation was a different thing from a tax upon the individual shareholders of stock in the corporation; that the property of the corporation, and the shares of stock of that corporation in the hands of stockholders, were different properties, and were consequently distinct subjects for taxation; and that an exemption of the one was not of itself an exemption of the other, nor the taxation of the one a tax upon the other in such a sense as to interfere with any exemption the latter might have from taxation.

The ruling, thus made, has been affirmed in the recent case of *Dewing v. Perdicaries*, 96 U. S. 196.

If shares of stock in a corporation, incorporated by a state, owned by a shareholder residing in the same state, constitute a property separate from that owned by the corporation, and are liable to taxation as the property of such shareholder, whether the property of the corporation be taxed by such state, or not, it certainly follows that shares of stock in a corporation incorporated by one state, are, when owned by a resident of another state, liable to taxation by the state in which he resides, whether the property of such non-resident corporation be taxed by the state in which it has its situs, or not: *Keyser v. Rice*, 47 Md. 211, 212; *Latrobe v. Mayor and City Council of Baltimore*, 19 Md. 13; *Farrington v. Tennessee*, 95 U. S. 686, 687, 691, 692; *Dewing v. Perdicaries*, 96 U. S. 196; *Van Allen v. Assessors*, 3 Wall. 584; 1 Redf. Am. R. W. Cases, Sup. 503, 504; *State v. Branin*, 3 Zab. 507; *State v. Bentley*, 3 Zab. 341; *Newark City Bank v. Assessors*, 30 N. J. 20; Cooley on Taxation 15, 16, 274; Burroughs on Taxation 188; *Dwight v. Mayor of Boston*, 12 Allen 316, 322; *Howell v. Cassapolis*, 35 Mich. 472; *City of Evansville v. Hall*, 14 Indiana 27; Angel & Ames on Corp., 8th ed., sections 560-564.

When a corporation has its situs in one state, and the shareholders of such corporation reside in another state, the taxation by the one state of the corporate property, and by the other state of the shares in that corporation, owned by persons residing in such other state, is not a circumstance upon which the courts of either state can found an objection. Such taxation cannot be objected to as double taxation. The theory that taxation of the property of a corporation, and also of its shares, is double taxation, has no application except to a case where the situs of the property of such cor-

poration, and the situs of the ownership of its shares of stock, are both in one state, and both properties are taxed for the same object and by the same authority in such state. Taxes, which are imposed by different authorities, are not objectionable upon any theory of double taxation, even if the taxes thus imposed affect the same property. Municipal taxes are not unconstitutional, because they affect property already taxed for state purposes. Federal direct taxes, laid under article 1, section 8, of the Constitution of the United States, would not be unconstitutional, although they would certainly be imposed upon property already subject to state and municipal taxation. Taxes imposed by different states, upon the same property, could not be accounted double taxation. And certainly taxes imposed by different states upon properties different in nature, however connected by relation to each other, cannot be accounted double taxation.

The situs of the corporation does not determine the situs of the shares of such corporation for the purposes of taxation. Such shares represent only the right of the shareholder to receive an aliquot portion of the net profits of the corporation; and being rights of property wholly personal to the shareholder, can have, as property, no situs except the residence of such shareholder. See cases last cited.

The register of shares in the principal office of a corporation does not create a situs for such shares as taxable property. That book is only a record, kept for the security of the corporation, to afford evidence of the ownership of such shares. A transfer upon the registry is not necessary to divest the title of the owner of shares of corporate stock. The property in such shares is so completely vested in the owner, that his transfer of them, by a proper instrument, operates of itself to divest his title and to give to his transferee a right to demand a new certificate: *Bank v. Zacharie*, 3 How. 513; *Farmers' Bank v. Iglehart*, 6 Gill 56; *Baltimore City Passenger Railway Co. v. Sewell*, 35 Md. 252, 253; *Agricultural Bank v. Burr*, 24 Maine 254; *Angell & Ames on Corp.*, 8th ed., sect. 565. The register is only one of the *indicia* of title: *Dewing v. Perdicaries*, 96 U. S. 196.

C. J. M. G.

RECENT AMERICAN DECISIONS.

Supreme Court of Rhode Island.

WILLIAM M. FISHER v. HORACE TIFFT.

If an outgoing partner takes a bond of indemnity from the remaining partner, against all the liabilities of the firm, and the obligor obtains a discharge in bankruptcy, and subsequently, the obligee is compelled to pay the partnership debts, the discharge in bankruptcy is a bar to a suit on such bond of indemnity.

THIS was an action of debt on a bond, the condition of which was as follows, to wit: "The condition of this bond is such that if the said obligors shall well and truly pay, and cause to be paid, all the debts and liabilities of the late firm of H. Tift & Co., in which said Fisher (the plaintiff) was a partner, and save the said Fisher from loss by reason thereof, this bond to be void, otherwise of full force and virtue." The bond was dated October 6th 1858, and was executed on that day by the defendant, and also by Milton W. Blackinton and J. E. Brewster.

It appeared in testimony submitted to the court, jury trial having been waived, that previous to October 6th 1858, the plaintiff and defendant, together with Blackinton, were engaged in business as co-partners, under the firm of H. Tift & Co., and that the plaintiff had sold out his interest in the firm to Brewster, and that thereupon the defendant Blackinton and Brewster formed a new co-partnership, and having agreed with the plaintiff to assume the debts and liabilities of the old co-partnership, gave him the bond aforesaid for his indemnity. It also appeared that December 21st 1861, one Josiah D. Richards recovered judgment for \$1964.42 against the members of the old firm, including the plaintiff, upon a claim which he held against the old firm, and that June 1st 1868, the sum of \$673.33 still remaining due on said judgment, the plaintiff was compelled to pay to said Richards, in order to obtain his release from said judgment, the sum of at least \$233.72. He claimed that he was compelled, also, to pay for his release the further sum of \$370.16, making in all the sum of \$603.91, which, with interest thereon, he sought to recover in this action.

The defendant set up in bar of the action his discharge in bankruptcy, under the laws of the United States, which was granted to him May 11th 1868, and which discharged him from all debts and claims, which were made provable by the law against his estate, and which existed on the first day of August 1867, the day on which

his petition in bankruptcy was filed. The plaintiff contended that this claim in suit did not exist, and was not provable before his payment on the Richards judgment, which was not made until after the discharge was granted, and that, therefore, the discharge was not a bar to his action. He conceded that if the claim was provable the action was barred.

Thurston, Ripley & Co., for plaintiff.

Samuel Currey, for defendant.

The opinion of the court was delivered by

DURFEE, C. J.—The Bankrupt Act, Revised Statutes of the United States, § 5068, provides that “in all cases of contingent debts and contingent liabilities, contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed,” &c. The act also provides, § 5070, that “any person liable as bail, surety, guarantor, or otherwise, for the bankrupt,” whether he has paid the debt or not, may prove the debt if the creditor omits to prove it. The language of these provisions applies broadly to contingent and uncertain claims and liabilities. Is it not broad enough to cover the claim in suit?

The defendant relies upon § 5068, and unless the claim in suit is otherwise provided for in the act, the section seems to be broad enough to cover it. Certainly the bond creates, if not a contingent debt, at least a contingent liability, and such a liability is within § 5068. The present Bankrupt Act is in this respect, as is remarked in *Jones v. Knox*, 46 Ala. 53, also in 8 Bankrupt Register 559, broader in its application to contingent claims than the Bankrupt Act of 1841, and consequently the decisions, under the Act of 1841, which are relied on by the plaintiff, are not fully in point. The Act of 1841 was more like the English Bankrupt Act, which extended to debts payable on a contingency or to contingent debts; but did not extend to a mere contingent liability. *Hankin v. Bennett*, 8 Exch. Rep. 107; *French v. Morae*, 2 Gray 111; *Riggin v. Magwire*, 15 Wall. 529. The plaintiff contends that the claim was not provable, because incapable of proof. We think, however, it was capable of an approximate proof, which is all that can ever be made in cases of contingent liability. When the defendant filed his petition in bankruptcy, the balance due on the judgment had been due for several years, and there could be little reason to doubt that the plaintiff, if he had the means, would be

called upon for payment. And see *Jones v. Knox*, cited above, and *Jones v. The State*, 28 Ark. 119.

It may be questioned, however, whether the claim in suit is not "provided for" by § 5070, rather than by § 5068. The provision contained in § 5070 is somewhat similar to a provision of the English Bankrupt Act, which extends to sureties and persons "liable for any debt of the bankrupt." The provision of the English Bankrupt Act came up for construction in *Wood v. Dodgson*, 2 M. & S. 195. There, on the dissolution of a firm, consisting of three partners, two of them assigned their interest in the joint effects to the third, and took from him a covenant to pay the debts and indemnify them. The third partner, however, became a certificated bankrupt, and afterwards, the other two partners were obliged to pay a debt of the firm. An action subsequently brought on the covenant, was held to be barred by the discharge in bankruptcy, upon the ground that under the covenant the covenantor became in equity, as between the partners, the principal debtor, and the other two his sureties, and that, as sureties or *persons liable* for the debt of the bankrupt, they were subject to the provision aforesaid. And the same view was taken by the Supreme Court and Court of Appeals of New York, under the Act of 1841, in *Crafts v. Mott*, 5 Barb. S. C. 305; 4 N. Y. 603. There the plaintiff and defendant gave their bond on a joint purchase of land. The plaintiff afterwards conveyed to the defendant, who thereupon agreed to pay the bond and indemnify him. Subsequently the defendant was discharged as a bankrupt; and after that instalments fell due on the bond which the plaintiff was obliged to pay. It was held that the plaintiff was to be regarded as standing in the relation of surety for the defendant, and therefore that his right to recover for the instalments so paid was barred by the discharge. See also *Mace v. Wells*, 7 How. U. S. 272; *Butcher v. Forman*, 6 Hill 583.

These cases seem to show that the claim in suit is to be regarded as provided for by § 5070; but whether provided for by § 5070, or provable under § 5068, in either case any action thereon is barred by the discharge. We think it was either provided for by § 5070 or provable under § 5068, and therefore give the defendant judgment for his costs.

Notwithstanding the great respect to Court of Rhode Island are justly entitled, there is some room for differ-

ence of opinion as to the point involved in this case. Of course, all agree that the claim here sued upon was barred by the discharge in bankruptcy, if the same was provable, otherwise not. It is equally clear that if provable at all, it must have been either under § 5068, as a "contingent liability," or under § 5070, as a payment by one "liable as bail, surety, guarantor or otherwise for the bankrupt." To consider the last ground first. Is an outgoing partner, who still remains bound to the original partnership creditor, and on the original partnership debt, liable as surety or guarantor for his remaining partner, merely because the latter has, as between themselves, agreed to pay the whole debt, and to indemnify the other from his liability, the creditor having done nothing to release him from his original and primary obligation? That he is still an original debtor and not a surety, so far as the creditor is concerned, is of course admitted. If sued by him, he must be sued as a co-debtor, and not as surety or guarantor. As to him, he is still originally and not collaterally liable. He would not be discharged or released by any extension or indulgence as to payment by the creditor to the remaining partner, as a surety or guarantor might be. Would he be at the same time principal debtor to his creditor, and surety only as between himself and his partner, without some *express* agreement or understanding to that effect? The argument is, that because the remaining partner ought equitably to pay the whole debt, the retiring partner stands to him *in the light of* a surety merely, in equity at least, and therefore should be so considered, in a suit at law, by him against the other, for contribution or remuneration. It is true doubtless that in equity he may for some purposes be considered to stand in the same situation as a surety, strictly so called. For this reason, he would be entitled, in a court

of equity, if he was called upon to pay the whole debt, to be subrogated to the rights of the creditor as to any collaterals or security he might hold against the remaining partner alone, for the same debt, and so might enforce them in equity in the name of the creditor against his former partner. See *Butler v. Birkey*, 13 Ohio St. 515; *The Aetna Ins. Co. v. Wires*, 28 Vt. 93; *McCormick v. Irwin*, 35 Penna. St. 111; *Frood, Jacobs & Co.'s Estate*, 73 Id. 459. But this is allowed only in equity, and because it is for *his advantage* and protection, and in order to compel the real debtor to pay the debt himself. But does the same rule apply *at law* in a suit by him to recover remuneration, when the effect of it would be exactly the reverse, viz., to deprive him of a remedy, and release the true debtor from paying any one? Does the maxim, *cessante ratione, cessat ipsa lex*, apply? That is the question involved in *Fisher v. Tift*.

The English courts put a strict construction upon the words "surety or other person liable for the bankrupt," and refuse to extend the term so as to include those who might equitably be considered a surety or person liable for the bankrupt, such as to bail, who became such before the bankruptcy, but who were not called upon to pay until after. These were not allowed to prove under the Bankrupt Act of 49 Geo. 3, c. 121, s. 8, as a surety or person liable for the bankrupt, and it required additional legislation to include their case by express words. See *Newington v. Keays*, 4 B. & Ald. 493 (1821); *Hewes v. Mott*, 6 Taunt. 329, 2 Marsh. 192 (1815). And see *Goddard v. Vanderheyden*, 3 Wils. 262 (1771). But the bail of a bankrupt, who pays money solely for his benefit, has certainly as good a right to indemnity, and share in the assets of the bankrupt, and to be considered as an equitable surety for him, as a copartner has, who in paying

his money only pays his own debt, and for which he had received the original consideration.

In *Hoare v. White*, 3 Jur. (N. S.) 445, 40 Eng. Law & Eq. 365 (1857), the plaintiff was under-tenant to the defendant, and the defendant had agreed to indemnify him against paying rent to the head landlord, and then went into bankruptcy, and the tenant was compelled to pay the whole rent. After the defendant's discharge, he sued him for the same, and it was claimed that the plaintiff was "a person surety or liable for the debt of the bankrupt," and might have proved his claim in bankruptcy, and therefore it was now discharged. The term surety in the bankrupt laws, it was said, has had the widest extension, and *Wood v. Dodgson*, 2 M. & S. 195, and *Vansandau v. Corbie*, 3 B. & Ad. 13, were cited; but the whole Court of Exchequer, without even calling upon the other side, said there must be judgment for the plaintiff.

So, where the plaintiff was the acceptor of a bill of exchange, which the defendant, for good consideration, subsequently agreed to pay, and indemnify the plaintiff therefrom, but went into bankruptcy, and the plaintiff was compelled to pay the bill, it was held he could not prove the same against the defendant on the ground of being a surety or other person liable for him: *Yallop v. Ebers*, 1 B. & Ad. 698 (1831).

So, one who draws a bill payable to his own order, and then endorses it for the accommodation of the next endorsee, is not a "surety or liable for the debt" of such endorsee, so that he could prove in bankruptcy against him: *Mayer v. Meakin*, Gow 183 (1820). But there does not seem to be entire consistency in the views of the English courts on this subject, since it has several times been held, that an accommodation endorser is a "person liable for the debt" of the maker so accommodated, and if the latter goes into bank-

ruptcy, the former, having paid the debt, may prove against his estate, and so is barred by his discharge: *Bassett v. Dodgin*, 9 Bing. 652 (1833); *Vansandau v. Corbie*, 3 B. & Ad. 13 (1819); *Sedman v. Martinant*, 13 East 427 (1811); *Ex parte Lloyd*, 1 Rose 6; *Ex parte Yonge*, 3 Ves. & Beam. 40.

The Supreme Court of Massachusetts considered this very question of *Fisher v. Tift*, in *Morton v. Richards*, 13 Gray 15 (1859), a case arising under the state insolvent law: st. 1838, c. 163, p. 3. That stat. allowed the proof of any sum paid "by any surety of the debtor in any contract, if the payment was made before the first dividend." The plaintiff had been in company with one Johnson, under the firm of Johnson & Morton. The latter sold out to one Daniels, and the new firm of Johnson & Daniels assumed all the liabilities of the old firm of Johnson & Morton, and agreed to indemnify Morton against his liability therefor. Johnson & Daniels then went into insolvency, and one of the old creditors compelled Morton to pay his whole debt, and Morton offered to prove the same against Johnson & Daniels before any dividend had been declared, on the ground that he had paid it as surety for them. But the full court refused to allow it, on the ground that he was not a surety, but a principal debtor, and in paying it he paid his own debt. A surety, said the court, is "he who becomes answerable, by contract with another, for the payment to him of a third person's debt, or for the performance of a third person's other undertaking or duty." This case seems to be in direct conflict with *Fisher v. Tift*, above.

It is true, the U. S. Bankrupt Act uses the phrase "or otherwise liable for the bankrupt," but does not that mean otherwise similarly liable—*ejusdem generis*? The same general phrase was found in the English Bankrupt Act, but was held not to extend to all liabilities. The phrase is liable for the bankrupt.

One co-partner is liable *with* his partner, but not exactly for him. There seems to be as much reason for calling him a guarantor for his partner as for saying he is a surety. The familiar maxim of *noscitur a sociis* applies. General words are often restricted by prior specific words. Thus, the words "other person whatever" after "tradesman, artificer, workman, laborer or other person whatsoever," do not include every person—a stage-driver—but only persons *ejusdem generis*: *Sandiman v. Breach*, 9 B. & C. 96 (1827). Nor an attorney: *Peate v. Dickon*, 1 C., M. & R. 428 (1834). A statute which forbids "any artificer, calico printer, &c., &c., or any other person," from absenting himself from his employment, does not apply to a house-servant: *Kitchen v. Shaw*, 6 Ad. & El. 729 (1837). A statute which enacts that "no writ or process shall be sued out against any district surveyor or other person for anything done under the act, without a month's notice," does not apply to every other person, but only to persons *ejusdem generis* with district surveyors: *Williams v. Golding*, Law Rep. 1 C. P. 69 (1865).

A power to tax "auctioneers, grocers, merchants, &c., and all other business, trades, associations or professions whatever," does not include the business or profession of a lawyer: *City of St. Louis v. Laughlin*, 49 Mo. 559 (1872). A law prohibiting a person to navigate "any lighter, wherry or other craft," does not apply to one navigating a steam-tug of eighty-seven tons, burden, but only to vessels of the same kind as lighters and wherries: *Reed v. Ingham*, 3 El. & Bl. 889 (1854). A statute, "that whenever the exigencies of any army in the field are such as to make impressment of forage, articles of subsistence or other property," absolutely necessary, it may be made, does not include all other property, but only similar to those specified in the act: *White*

v. Ivey, 34 Geo. 199 (1865). A statute giving a board of officers power to remove "for incompetency, improper conduct or other cause satisfactory to the board," means only kindred causes: *State v. McGarry*, 21 Wis. 496 (1867). Analogy, therefore, would seem to sanction the conclusion that the words "otherwise liable for the bankrupt," should be confined to liabilities similar to those of sureties, guarantors, &c.

Thus far as to the argument upon the question; now as to the authorities cited by the learned court. Some of them do not apparently have a material bearing upon the exact point involved. The only point involved in *Jones v. The State*, 28 Ark. 119, was whether a surety on a bail-bond was released by his own discharge in bankruptcy, as against the obliges in the bond, a point too plain to question. Exactly similar was *Jones v. Knox*, 46 Ala. 53, a surety on a guardian's bond. No doubt the liability of a surety on a bond to the creditor is, as between them, a contingent liability, which may be proved against the estate of the surety in bankruptcy; but that is very far from this case. Here the question is not whether the obligee of a bond can prove against the estate of the surety thereon, but whether some other party can prove. The only point in *Mace v. Wells*, 7 How. 272, also relied upon by the court in *Fisher v. Tift*, was whether one who was avowedly and expressly only a surety for another, could prove against the principal for a payment made by such surety after the bankruptcy, on a claim over-due before—a case clearly provided for by the express terms of the Bankrupt Act. It must be admitted, however, that the cases of *Wood v. Dodgson* and *Crafts v. Mott* support the view taken by the court. To these also might be added *Aftale v. Fourdrinier*, 6 Bing. 306, 3 M. & P. 743 (1829); *Deum v. Speakman*, 7 Blackf. 317 (1844); *Frentress v. Markle*, 2 Iowa 553 (1850);

Clarke v. Porter, 25 Penns. St. 141 (1855), and perhaps others. But it may be noticed that in some of these cases the retiring partner had either paid the whole or more than his proportion of the joint debt, and therefore was equitably entitled to contribution from his partner, independent of any special bond of indemnity, which might give a stronger claim to prove, for the excess at least above his share, against the bankrupt partner; whereas, in *Fisher v. Tift* the plaintiff had not paid even a third of the joint debt, and his claim for reimbursement rested solely upon his bond, and not upon any equitable rule of contribution. This very ground of distinction is relied upon in some of those cases.

In view of these conflicting decisions, it is obvious there is room for honest difference of opinion upon the provableness of this claim under the surety clause.

2. Can it be proved, under § 5068, as a "contingent debt or liability contracted by the bankrupt?" Was Tift under a contingent liability to Fisher when he went into bankruptcy, Fisher not then having been called upon to pay anything on the joint debts? To determine that question, it is necessary to consider the distinction between a "contingent liability" and a "liability depending upon a contingency." The one is provable, the other not. The first is an existing demand, fixed, established, determined, but the cause of action upon which depends on some future contingency. The other is a liability, the very existence of which depends upon some future event. At present it is only inchoate, initiated, but not complete. Doubtless the word "liabilities" is broader than the word "debts," since it includes unliquidated claims, like policies of fire insurance, for instance, and is not confined to fixed and ascertained sums or debts; but the contingent element is the same in both.

The same facts and circumstances which render a fixed "debt" not provable because of some contingent event, will have the same effect upon a contingent "liability." A promise to pay a certain fixed sum, if the promisor is ever able, is a contingent promise, and it may be proved in bankruptcy, although the contingency does not occur until after the petition is filed. The liability of an insurance company before a loss, is a contingent liability, and if the loss occurs before a final dividend, though after the company becomes bankrupt, it is provable against them: *In re the American Plate Glass Co.*, 12 Bank. Reg. 56, in which the distinction here stated is expressly recognised.

If a debtor makes his note to the creditor for part of the amount due, and deposits it with a third person, to be delivered to the creditor, if he will accept the same in full, and while it is in such third person's hands, the debtor goes into bankruptcy, he is at that moment contingently liable on the note, and if the creditor afterwards accepts it, he may prove it as an existing contingent liability at the date of the petition: *Spalding v. Dixon*, 21 Vt. 45 (1848).

The promise of an endorser is a contingent liability, certain in amount, but its enforcement, or cause of action thereon, is dependent upon the contingency of due demand and notice. Such a claim is therefore clearly provable against the endorser, although the contingency had not happened at the commencement of the proceedings. For the same reason the liability of a surety or guarantor may be proved against him, though the default of the principal does not occur until after the surety has gone into bankruptcy. All these are contingent liabilities, properly so called. But the liability of the principal to reimburse his surety is not a contingent liability, but a liability depending wholly upon a contingency, the con-

tingency of the surety paying the debt, and which may or may not happen, even though the principal has made default. No liability even exists until the surety has paid the claim; he has no cause of action until that time, and the Statute of Limitations begins to run only from that time. Consequently, if the surety has not paid the debt prior to the bankruptcy of the principal, he could not (except for the *express* provision in the Bankrupt Act allowing it) afterwards pay it and prove against the bankrupt. He could not do so under the mere "contingent liability" clause. There was no liability from the bankrupt to him at the time of the bankruptcy, but only a liability to a liability, an exposure to a liability, but no more. See *McMullen v. Bank of Penn Township*, 2 Penna. St. 343 (1845); *Cake v. Lewis*, 8 Id. 493 (1848), approved, though distinguished, in *Stone v. Miller*, 16 Id. 453 (1851); *Pike v. McDonald*, 32 Me. 418 (1851); *Leighton v. Alkins*, 35 Id. 118 (1853); *Wells v. Mace*, 17 Vt. 503; *Pogue v. Joyner*, 1 English 241. These cases may have erred in not applying the United States Bankrupt Act, to payments made by a surety after the bankruptcy of the principal, but they are cited here only to show that without an express provision of a statute, a surety could not prove under the mere contingent clause. It is like the liability of a co-surety to indemnify his co-surety. If one surety goes into bankruptcy and the other afterwards, but before the discharge, pays the whole debt, he cannot prove for contribution against the other under the "contingent liability" clause, for at the commencement of the proceedings it was a liability depending wholly upon a contingency. Such were the uniform decisions in England and America. See *Porter, Ex parte*, 2 Mont. & Ay. 281 (1835); *Clements v. Langley*, 6 B. & Ad. 372, 2 Nev. & M. 269 (1839); *Wallis v. Swinburne*, 1

Exch. 203 (1847); *Dunn v. Sparks*, 1 Ind. 397 (1849), 7 Id. 499; *Dole v. Warren*, 32 Me. 94 (1850); *Swain v. Barber*, 29 Vt. 292 (1857); *Goss v. Gibson*, 8 Humph. 197 (1847); *Kerr v. Clark*, 11 Id. 77 (1850), and many others. *Tobias v. Rogers*, 13 N. Y. 59, is contra, but it seems to be quite out of the current. It required special provisions of law to allow such proof, which was first secured in England by the Bankrupt Law Consolidation Act of 1849. See *Adkins v. Farrington*, 5 H. & N. 586 (1860).

The distinction between contingent liabilities and liabilities depending upon a contingency, is illustrated by many analogies. Thus, a plaintiff in a suit at law is under a kind of liability to the defendant to pay him the costs, if he fails in the suit; but this is not a "contingent liability," but a liability depending upon a contingency, and therefore, if the defendant recovers judgment for costs after the plaintiff has filed his petition, though before his discharge, he cannot prove against his estate on the ground of an existing contingent liability at the date of the petition: *Wilkins v. Warren*, 27 Me. 438 (1847); *Oxlade v. North-Eastern Railway Co.*, 33 Law J. C. P. 171 (1864); *Dows v. Griswold*, 122 Mass. 440 (1877). So, a contract or bond by A. to indemnify B. against any costs he may be called upon to pay C., in a suit then pending between B. & C., is not a contingent debt of A. before the suit is determined, and if A. goes into bankruptcy before such termination of the suit, his discharge is not a bar to a subsequent suit on his bond, to recover the costs subsequently awarded to be paid by B. to C.: *Hankin v. Bennett*, 8 Exch. 107 (1852). It required special legislation to meet such a case, as is now done in England by the Act of 1869.

The liability of sureties on the bond of a public officer, cashier, treasurer,

&c., is a liability depending upon a contingency, and not a contingent liability; if, therefore, they go into bankruptcy before any breach of the bond, and such breach occurs before their discharge, it cannot be proved against their estate, and would not be barred by their discharge. *Woodward v. Herbert*, 24 Me. 362 (1844); *Dyer v. Cleaveland*, 18 Vt. 241 (1846); *Ellis v. Ham*, 28 Me. 385 (1848); *Loring v. Kendall*, 1 Gray 305 (1854); *Fowler v. Kendall*, 44 Me. 448 (1858). And even though one breach had occurred prior to the bankruptcy, the English courts (prior to the Act of 1861 allowing it) always held, that the bond could not be proved, since future breaches might also occur. *Marchman v. Brookes*, 2 H. & C. 908 (1864).

Why can not a claim for rent, under a lease for a quarter unexpired when the lessee goes into bankruptcy, be proved against a bankrupt as "a contingent demand," although he still remains in possession? Because, at the beginning of the bankruptcy, it was then uncertain whether the bankrupt would continue to occupy the entire quarter, and, if he did not, no claim for a quarter's rent could ever arise under the lease. It was a demand depending upon a contingency, and not a contingent demand. *Savory v. Stocking*, 4 Cush. 607 (1849); *Bosler v. Kuhn*, 8 W. & S. 183 (1844); *McDougal v. Paton*, 8 Taunt. 584 (1818); *Stinemets v. Ainslee*, 4 Denio 573 (1847); *Prentiss v. Kingsley*, 10 Penna. St. 120 (1848); *Lansing v. Prendergaet*, 9 Johns. 127 (1812). Such a course of decisions was overcome only by the express words of § 5071 of the Act of 1867, *Treadwell v. Marden*, 123 Mass. 390 (1877).

This distinction between a "contingent demand" and a "demand depending upon a contingency" has been fully recognised by the Supreme Court of the United States in *Reggin v. Maguire*, 15 Wall. 549 (1872). There, R. conveyed

land to E. in fee, with a covenant, that he had an indefeasible estate in fee therein. In fact the wife of T., a former owner, who was still living, had an inchoate right of dower therein, not having signed her husband's deed thereof to R. Subsequently, R. obtained his discharge under the Act of 1841. Five years after T. died, and his widow set up her claim for dower in the premises, which the grantee of R. was obliged to pay, and brought suit against R. on his covenant in the deed. It was held, that the discharge was no bar; that the claim was not provable against R.'s estate, it not being certain that the covenant would ever give rise to an actual duty or liability, and the cases of *Jemison v. Blower*, 5 Barb. 686, and *Sheldon v. Pease*, 10 Mo. 475, cited as sustaining an opposite doctrine, were wholly disregarded. See, also, *French v. Morse*, 2 Gray 111 (1854); *Bush v. Cooper*, 18 How. 82 (1855); *Bennett v. Bartlett*, 6 Cush. 225 (1850); *Reed v. Pierce*, 36 Me. 456 (1853); *Burruso v. Wilkinson*, 31 Miss. 537. From the well-settled doctrine that such proof could not be made as a contingent liability, it was found necessary to specially provide for it under the English Act of 1861, § 153. *Ex parte Elwes*, 33 Law J. Bank. 23 (1864). So, in *Fisher v. Tift*, the defendant had given the plaintiff a bond to indemnify him against any payments he should ever be called upon to make on the old partnership debts: that he ever would be called upon to pay any, and, if so, how much, was wholly contingent and uncertain; the foundation of the defendant's liability was laid, but "it might never give rise to an actual duty or liability." Thus, it appears, that the claim in this case could not have been proved under the Act of 1841.

Is there any material difference, in this respect, between the act of 1841, and that of 1867? In the former the language is "all persons having uncertain or contingent demands, against such bank-

rupt, may come in and prove such debts and claims under the act, and shall have a right, when these debts or claims become absolute, to have the same allowed them."

The language of the Act of 1867 is: "In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may claim therefor, and have his claim allowed, with a right to share in the dividends, if the contingency shall happen before the order for the final dividend, or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained."

Are the words "contingent debts and contingent liabilities" any freer from uncertainty and contingency (the only point now material) than the words "uncertain and contingent demand," or, as afterwards called, "such debts and claims?" The decisions, under the recent act, seem to agree with those under the former law.

A bond by a defendant in a suit to return to the plaintiff the property in controversy, if such shall be the final decision, is not a contingent liability, within the meaning of the act, and if he goes into bankruptcy, and obtains a discharge before the suit is decided, his discharge is no bar. It was a liability depending upon a contingency, and not an existing contingent liability. *United States v. Rob Roy*, 13 Bank. Reg. 235; 1 Woods 43 (1870).

A. deposits property on storage with B. for a reasonable compensation, but no time being fixed. After it remains a while A. obtains his discharge in bankruptcy, but the property still remains in B.'s possession. For the storage, which accrued after the bankruptcy, A.'s discharge is no bar. There was no existing contingent liability for future stor-

age, when A. went into bankruptcy. It was contingent, and uncertain, whether there ever would be any more liability, but not a contingent debt or liability within the meaning of the act. *Robinson v. Pesant*, 53 N. Y. 419 (1873).

In a suit against M. the property of H. was attached, as M.'s. H. gave a bond to dissolve the attachment, and J. became his surety thereon, and H. placed property in J.'s hands to secure him from liability as surety, and to hold the same until the litigation terminated. Before it terminated J. went into bankruptcy and received his discharge, still having the property in his possession. Subsequently the suit against M. was dismissed, and J. then refused to redeliver the property to H., and pleaded his discharge in bankruptcy. *Held*, no bar, because the very existence of the claim for a return of the property by J. was contingent upon an event which did not occur until after the discharge of the bankrupt. H. had no claim against J. until the question of J.'s liability on the bond as surety for H. had been determined. *Jacobson v. Horne*, 52 Miss. 185 (1876).

L. gave B. a continuing guaranty for goods to be supplied to K. to the amount of 200l., and then obtained his discharge in bankruptcy. B. continued to supply K. with goods after the bankruptcy. *Held*, that L. was liable, notwithstanding his discharge; that the guaranty was not a "contingent liability" under 12 & 13 Vict. c. 106, § 178 (1849). *Boyd v. Robins*, 5 C. B. N. S. 497 (1858), reversing s. c. in 4 Id. 749.

Notwithstanding the English statute has now become by repeated amendments much broader than ours in allowing claims "depending upon a contingency," yet they steadily refuse to allow bonds of indemnity to be proved against the bankrupt, where the breach did not occur until after the filing of his petition. See *Betterley v. Stainshy*, Law Rep. 2 C. P. 568 (1867); *Ex parte Wiseman*, Law Rep. 8 Ch. App. 35

(1871); *Kellock v. Enthoven*, Law Rep. 8 Q. B. 458; 9 Id. 241 (1871).

Especially is this the case where the contract of indemnity is a contract not to be performed once for all on the happening of a single contingency, but one which is liable to be broken repeatedly at different times, upon the happening of various contingencies, and where separate damages could be recovered for each breach: Law Rep. 8 Ch. App. 35; which is the precise case of *Fisher v. Tift*.

And they give two very good reasons for it. The first is that in cases like *Fisher v. Tift* there is a double contingency, first that the obligor or bankrupt does not pay the debt himself, and second that if he does not, the holder of the indemnity will be called upon to pay, or be able to pay if he is; and they say the bankrupt act did not intend to include contracts involving such double contingencies, but only one single contingency. This view was expressed in *Mitcalf v. Hanson*, Law Rep. 1 H. L. 242 (1866).

The other is that the non-payment of his own debt by the bankrupt himself is not a contingency at all within the meaning of the statute; that the word as there used means something casual, fortuitous, not something depending upon the mere will or whim of the obligor. To make the act apply to such a case would make it within the power of a bankrupt to make a claim provable or not against him, according to his election. In *Betterley v. Sainsby*, Law Rep. 2 C. P. 570, WILLES, J., says: "It was also decided in *Maples v. Pepper*, 18 C. B. 177, that a contingency that a bankrupt should break his contract is not such a contingency as is meant by the act."

For the same reason it ought not to be in the power of the party having the indemnity to pay the outstanding claims before the final dividend, so as to prove his claim and share in the assets, or,

by delaying to pay the creditors until after the final dividend, hold his claim over the bankrupt for future collection. Such an election might give him a dangerous power over the proceedings. It would seem, therefore, that there is even less foundation for proving this claim under § 5068, the contingent clause, than under § 5070, the surety clause. And there are some serious practical difficulties against proving under either. For how much amount shall he prove? The bond of indemnity in this particular case, it should be noted, was not confined to any particular specified debt, the amount of which was known, or could be readily ascertained, but for "all the debts and liabilities" of the late firm, the amounts and names of creditors being left entirely uncertain. How could Fisher know how much was due from Tift? He had left the firm ten years before. How could he know how much, if anything, he would be called upon to pay before the final dividend? How much would he be able to pay before that day? Could he prove for the whole penalty of the bond, and share in the dividends on the whole amount, irrespective of the amount he should be called upon to pay before distribution, or shall his percentage be computed only on the amount so paid? And if he proved for the whole bond, and took a dividend only on what he paid before distribution, but should pay another claim after that event, could he divide the bankrupt's indemnity bond and recover for the latter, but not the former?

Another test is this: the Bankrupt Act before quoted, as to contingent claims, provides that if a claim is provable, its present value may be ascertained and liquidated, and the creditor allowed to prove for that amount, implying that such claims only could be proved as could be thus valued. But how could the value of Fisher's indemnity against Tift in

this case be valued? The whole amount of the claims for which he was liable was unknown; there was no certain, reliable mode of ascertaining them. Fisher would not know; Tift might not know; there is no way to compel creditors to come forward and disclose their claims against Tift & Co. And if these were all known, it might be

impossible to determine how much Fisher would ever really pay on them, and so how much would be the "present value" of his bond of indemnity? Theoretically and practically, therefore, the question of proof in such cases is certainly not free from embarrassment.

EDMUND H. BENNETT.

Supreme Court of New Jersey.

STATE, JAMES ROCHE, PROSECUTOR, v. THE MAYOR, &c., OF JERSEY CITY.

Every statute must be considered according to what appears to have been the intention of the legislature, and even though two statutes relating to the same subject be not, in terms, repugnant or inconsistent, if the later statute is clearly intended to prescribe the only rule which should govern the case provided for, it will be construed as repealing the earlier act. The rule does not rest strictly upon the ground of repeal by implication, but upon the principle that when the legislature makes a revision of a particular statute, and frames a new statute upon the subject-matter, and from the framework of the act it is apparent that the legislature designed a complete scheme for this matter, it is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is discarded. It is decisive evidence of an intention to prescribe the provisions contained in the later act as the only ones on that subject which shall be obligatory.

The rule in this case applied to the ordinances of a municipal corporation.

THIS was a certiorari to a police justice to bring up the record of a conviction of James Roche, under an ordinance of Jersey City, for selling liquor on Sunday. The facts are sufficiently stated in the opinion.

C. H. Winfield, for the plaintiff.

H. Traphagen and Gilbert Collins, for the defendants.

The opinion of the court was delivered by

VAN SYCKEL, J.—James Roche, the prosecutor, was convicted before a police justice for violating the ninth section of an ordinance of Jersey City, passed July 8th 1862, which prohibits the sale of intoxicating liquors on Sunday.

The question presented by this case is, whether the ninth, tenth

and eleventh sections of that ordinance, which forbid the sale of spirituous liquors on the Sabbath, are in force. If not, then the prosecutor was punishable only by indictment. Rev., p. 493, § 50; p. 238, §§ 61, 62. By an act, approved April 2d 1869, Pamph. L., p. 1377, Jersey City, Bergen and Hudson City were consolidated. Previous to the consolidation, each of these places had its peculiar ordinances in reference to licenses and the sale of spirituous liquors.

The ordinances of old Jersey City (passed July 8th 1862), in which Roche lived, by their ninth, tenth and eleventh sections, prohibited the sale of intoxicating drinks on Sunday. By the one hundred and twenty-second section of the Act of 1869, Pamph. L., p. 1427, it was provided "that all ordinances of Jersey City, as at present incorporated, or other ordinances now in force in other cities hereby consolidated, that may be in force when this act goes into effect, so far as they may be applicable to the city hereby incorporated, and so far as not inconsistent with this act, shall be in force until altered or repealed by the common council hereby created."

The ordinances concerning inns and taverns in the several cities which had been consolidated being very conflicting, it was difficult to determine which of them were to be applied to the whole city. This difficulty was met by the charter of 1870, Pamph. L., p. 1170, § 195, which provided that the various ordinances should be in force within the limits of the city for which they were enacted respectively, and until altered or repealed by the aldermen by that act created. The effect of this legislation was to leave the ordinances of each of the three cities which had been consolidated, in force within the limits for which they had been originally passed, until altered or repealed.

By the Act of 1870, Pamph. L., p. 1195, power was given to the board of aldermen to pass, alter and repeal ordinances to license and regulate inns and taverns, and regulate the sale of spirituous or intoxicating liquors, or prohibit such sale within the city limits. Under this authority, the mayor and aldermen of Jersey City passed an ordinance, on the subject of licenses, October 4th 1870, in which there was no Sunday clause.

Did this ordinance, which applied to the whole city, repeal, by implication, the several ordinances on the same subject, which, up

to that time, had been in operation in the several cities which had been consolidated?¹

It is contended, on the part of the city, that the ordinances of 1870, which omitted the Sunday clauses, are not inconsistent with sections nine, ten and eleven, the Sunday clauses in the ordinances of 1862 of old Jersey City, and that, therefore, those sections still remain in force. The rule of law relied upon to support this proposition is, that courts are bound to uphold the prior law, if the two acts may well subsist together.

The ordinance of 1870 does not expressly repeal the ninth, tenth and eleventh sections of the ordinance of 1862, and it is a familiar doctrine that repeals by implication are not favored. When there are two laws on the same subject, the rule is to give both effect if possible. But if the two are repugnant in their provisions, the later, to the extent of the repugnancy, operates as a repeal of the former; and where they are not repugnant in terms, yet if the later act covers the whole subject-matter, and it appears that it was intended as a substitute for the first act, it will operate as a repeal of that act.

In *United States v. Tynen*, 11 Wall. 88, it was held that where there are two acts of Congress on the same subject, and the later embraces all the provisions of the first and also new provisions, and imposes different penalties, the later act operates, without any repealing clause, as a repeal of the first. To have the rescinding effect it is not necessary that the subsequent act should have every provision of the former one; it is sufficient if it revises the whole subject-matter, and an intention is manifest to make it a substitute for the earlier act. *Bartlet v. King*, 12 Mass. 537.

In *Murdock v. City of Memphis*, 20 Wall. 617, where the question was, whether the second section of the Act of 1867, by implication, repealed the twenty-fifth section of the Act of 1789, the court said: "A careful comparison of these two sections can leave no doubt that it was the intention of Congress, by the later statute, to revise the entire matter to which they both had reference, to make such changes in the law as it stood, as they thought best, and

¹ See *Nusser v. Commonwealth*, 25 Penn. St. 126. In this case an act limited to a single county, prescribed the mode of punishing an offence, and subsequently an act was passed for the whole state, prescribing the punishment for the same offence. *Held*, that the latter act repealed the former. See, however, *McRae v. Wessel*, 6 Ired. Law 153.

to substitute their will in that regard, entirely for the old law on the subject. We are of opinion that it was their intention to make a new law, so far as the present law differed from the former, and that the new law embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself and repealed all other law on the subject embraced within it."

The ordinance of July 8th 1862, was entitled "An ordinance regulating inns, and taverns, and restaurants, and the sale of spirituous and intoxicating liquors," and the ordinance of October 4th 1870, has precisely the same title. When the latter ordinance was passed, it was expressly for the whole city, and it must be presumed that the aldermen, upon the subject of inns and taverns, intended to make the alteration authorized by section one hundred and ninety-five of the charter of 1870, and to establish a uniform rule for the new city, which should supersede the prior legislation, which had only a local application to one of its divisions. By dropping out the Sunday clauses, uniformity was established by the operation of the state law throughout the city. It cannot be supposed that in revising this subject it was intended to maintain a different law for different parts of the same city, when the local legislature had no authority to enact an ordinance which was not, in its operation, co-extensive with the city limits.

It was only by force of the one hundred and ninety-fifth section of the Act of 1870, that the discordant ordinances of the several cities could be kept in force; they ceased to have any effect when the aldermen passed a uniform law upon the whole subject in 1870. The authorized alteration was made by substituting a new ordinance on the same subject, which omitted the peculiarities of the prior local law, and selected from it such provisions as it was deemed desirable to retain.

When a statute is revised, or one act framed from another, some parts being omitted, the parts omitted are not revived by construction, but are to be considered as annulled. *State v. Wilson*, 43 N. Hamp. 419; *Farr v. Brackett*, 30 Vt. 344; *Giddings v. Cox*, 31 Vt. 607; *Pingree v. Snell*, 42 Maine 53.

Every statute must be considered according to what appears to have been the intention of the legislature, and even though two statutes, relating to the same subject, be not in terms repugnant or inconsistent, if the later statute is clearly intended to prescribe

the only rule which should govern the case provided for, it will be construed as repealing the original act.

The rule does not rest strictly upon the ground of repeal by implication, but upon the principle that when the legislature makes a revision of a particular statute, and frames a new statute upon the subject-matter, and from the framework of the act it is apparent that the legislature designed a complete scheme for this matter, it is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is discarded. It is decisive evidence of an intention to prescribe the provisions contained in the later act as the only ones on that subject which shall be obligatory. *Sacramento v. Bird*, 15 Cal. 294; *State v. Conckling*, 19 Cal. 501.

In 1871, a new charter was passed for Jersey City. Laws of 1871, p. 1094. By section one hundred and sixty-eight of this act, the charter of 1870 was repealed, with a proviso that "all ordinances now in force in said city, so far as consistent with this act, and applicable to the government hereby contemplated, shall remain in force until altered or repealed, and no longer."

There is a marked difference between this language and that of the proviso in section one hundred and ninety-five of the charter of 1870. The latter, in terms, saved the local ordinances of the several cities composing the new city, while the Act of 1871 seems to contemplate the existence of the fact, that under the charter of 1870, the city authorities had exercised the granted power to unify the discordant ordinances, and it preserves only those ordinances in force in the city, not those in force in parts of the city, so far as consistent with the Act of 1871, and applicable to the government thereby created. I think the language in this section shows that it was not designed to perpetuate the anomalous state of things which existed when the charter of 1870 was framed.

It is true that the language "in force in the city," might include "laws in force in parts of the city," yet the fact that the apt words used in the charter of 1870 to save such local laws, were dropped out of the saving clause in the charter of 1871, is significant of the legislative intent.

In my opinion, the ordinance of June 6th 1871, expresses the will of the legislative department of the city government upon the entire subject mentioned in its title, and its effect is to annul all

provisions in the ordinance of 1862 which were not incorporated in it.

The judgment below was without authority, and should be set aside, with costs.

A statute may be repealed either (1) by the express words of a subsequent statute, or (2) by necessary implication.

No proposition, however, is better settled upon authority than that repeals by implication are not favored by the law: *Foster's Case*, 11 Co. 63, n; *McCool v. Smith*, 1 Black 470; *Wallace v. Bassett*, 41 Barb. 92; *Breitung v. Lindauer*, 37 Mich. 217; *Hogan v. Guion*, 29 Gratt. 705; *Smith v. Vicksburg*, 54 Miss. 615; *United States v. One Case of Hair Pencils*, 1 Paine 400; *State v. Judge of St. Louis Probate Court*, 38 Mo. 529; *State v. Berry*, 12 Iowa 58; *People v. San Francisco, &c., Railroad Co.*, 28 Cal. 254; *Blain v. Bailey*, 25 Ind. 165; *Conner v. Southern Express Co.*, 37 Geo. 397; *People v. Barr*, 44 Ill. 198; *Snell v. Bridgewater Co.*, 24 Pick. 296; *Buckingham v. Steubenville, &c., Railroad Co.*, 10 Ohio St. 25; *Furman v. Nichol*, 3 Coldw. 432; *Bowen v. Lease*, 5 Hill 221; *Goodrich v. Milwaukee*, 24 Wis. 422; *Horton v. Mobile School Commissioners*, 43 Ala. 598; *Kerlinger v. Barnes*, 14 Minn. 526; *State v. Severance*, 55 Mo. 378. The same rule applies to repeals by implication effected by the adoption of a new state constitution: *Ohio ex rel. Evans v. Dudley*, 1 Ohio St. 437; *Cass v. Dillon*, 2 Id. 607.

The rule is generally stated to be, that in order that a prior statute should be repealed by a subsequent affirmative statute upon the same subject, containing no negative words or express repealing clause, there must be a direct and irreconcilable conflict between the two statutes. If the two acts can by any reasonable construction be reconciled and made to stand together, the

latter statute will not work a repeal of the former: *State v. Blake*, 35 N. J. Law 208; *The People v. Palmer*, 52 N. Y. 83; *Bowen v. Lease*, 5 Hill 221; *Williams v. Potter*, 2 Barb. 316; *People v. Deming*, 1 Hilton 271; *People v. Van Nort*, 64 Barb. 205; *Fowler v. Pirkins*, 77 Ill. 271; *Covington v. City of East St. Louis*, 78 Id. 548; *Irerson v. State*, 52 Ala. 170; *Forqueran v. Donnally*, 7 W. Va. 114; *Smith v. Hickman*, Cooke (Tenn.) 330; *McCartee v. Orphan Asylum*, 9 Cow. 437; *State v. Woodside*, 9 Ired. L. 496; *Conservators of River Thames v. Hall*, Law Rep. 3 C. P. 415; *Thorpe v. Adams*, Law Rep. 6 C. P. 125; *Reg. v. Champneys*, Id. 394; *Warrington, Ex parte*, 3 De G., M. & G. 159; *Dukins v. Seaman*, 9 M. & W. 777; *McCool v. Smith*, 1 Black 459; *Brown v. County Commissioner*, 21 Penna. St. 37; *Easton Bank v. Commonwealth*, 10 Id. 448; *Street v. Commonwealth*, 6 W. & S. 209; *Pratt v. Atlantic, &c., Railroad Co.*, 42 Me. 579; *Richards v. Patterson*, 30 Miss. 583; *Buchanan v. Robinson*, 59 Tenn. 147; *Hogan v. Guion*, 29 Gratt. 705; *Smith v. Vicksburg*, 54 Miss. 615; *United States v. One Case of Hair Pencils*, 1 Paine 400; *State v. Judge of St. Louis Probate Court*, 38 Mo. 529; *State v. Severance*, 55 Id. 378. Cases upon this point and the second point preceding might easily be multiplied.

If the subsequent statute is inconsistent with and repugnant to the provisions of the prior statute, so that they cannot both stand together, it operates as a repeal of the prior statute; but such repeal by implication will in general be limited to repealing as little as possible of the former statute, and, unless a contrary intention is manifest,

will ordinarily extend only to the contradictory parts of such statute: *Hayden v. Carroll*, 3 Ridg. P. C. 599; *Wood v. United States*, 16 Pet. 342. See also the cases above cited.

After all, however, the intention of the legislature controls the courts in determining whether a former law is repealed or not. Whatever that body manifestly intended is to be received by the courts as having been done by it, provided it has in some manner indicated or expressed that intention: ¹ *Thorpe v. Schooling*, 7 Nev. 15; *United States v. One Case of Hair Pencils*, 1 Paine 400; *Waterworks Co. v. Burkhart*, 41 Ind. 364; *State v. Severance*, 55 Mo. 378.

A law will not be held to be repealed by implication where the legislature have shown no design to repeal it, being ignorant of its existence or the scope of its provisions: *Tyson v. Postlewaite*, 13 Ill. 727.

Upon this principle of intention, if the co-existence of two sets of provisions in two acts would be destructive of the object for which they were passed, the earlier will be repealed by the later. Thus, where a local act authorized one body to name the streets and number the houses of a town, and a later act gave the same power to another body, it was held that the earlier act was repealed by the later: *Dow v. Metropolitan Board*, 12 C. B. N. S. 161; s. c. 31 L. J. C. P. 223.

So, where the inconvenience or incongruity of keeping the two enactments in force justifies the conclusion that the legislature did not intend such consequences: *Whiteley v. Heaton*, 27 L. J. M. C. 217; s. c. *nom. Rex v. Whiteley*, 3 H. & N. 143; *Smith v.*

State, 1 Stew. 506; *Commonwealth v. Kelliher*, 12 Allen 480.

So, an intention to repeal an act may be gathered from its repugnance to the general course of subsequent legislation: *The India*, Br. & Lush. 221; 33 L. J. P., M. & A. 193. See also *Rex v. Northleach and Whitney Roads*, 5 B. & Ad. 978.

So, acts which, although *in pari materia*, grant a right conditioned on different things, are inconsistent, and the inconsistency operates as a repeal of the earlier act; as where the earlier act granted an appeal within thirty days after the confirmation of a certain report, and the later act within thirty days after the filing of such report: *Gwinner v. Lehigh Railroad Co.*, 55 Penna. St. 126. So, a statute allowing appeals in all cases is repealed by a subsequent statute allowing an appeal whenever the judgment appealed from exceeds \$5, but containing no negative words: *Curtis v. Gill*, 34 Conn. 49. See also *Parrott v. Stevens*, 37 Id. 93. Upon this principle of the intention of the legislature, it is clear that the principal case was correctly decided. The same principle, substantially, as stated in the first part of the head note to the principal case, was also laid down in the following cases: *Rogers v. Watrous*, 8 Tex. 62; *Davies v. Fairbairn*, 3 How. 636; *City of Sacramento v. Bird*, 15 Cal. 294; *Swann v. Buck*, 40 Miss. 268; *Industrial School District v. Whitehead*, 13 N. J. Eq. 290; *Dexter & Linerick Plank Road Co. v. Allen*, 16 Barb. 15; *State v. Rogers*, 10 Nev. 319; *Gorham v. Luckett*, 6 B. Mon. 146; *Pierpont v. Crouch*, 10 Cal. 315.

The authorities lay down the rule

¹ See, however, *Mahony v. Wright*, 10 Ir. Com. Law 426, per LEFROY, C. J., where it is said that "it is settled by authority that the recital of an intention merely in a subsequent statute to repeal a former specific statute, will not operate by implication to repeal the former statute, and that in order to effect such a repeal there must be a clause of repeal in the repealing statute," or that there must exist the irreconcilable repugnancy between the two before alluded to.

generally, that if a revising statute embraces all the provisions of an antecedent law or laws upon the same subject, and reduces them to one system, such revising statute virtually repeals the statutes revised, although it contains no express repealing clause: *Bartlet v. King*, 12 Mass. 545; *Ashley, Appellant*, 4 Pick. 23; *Commonwealth v. Cooley*, 10 Id. 39; *Pulaski County v. Downer*, 10 Ark. 588; *State v. Conkling*, 19 Cal. 501; *Illinois, &c., Canal v. Chicago*, 14 Ill. 334; *Wakefield v. Phelps*, 37 N. H. 295; *State v. Wiltz*, 11 La. Ann. 446; *Farr v. Brackett*, 30 Vt. 344; *Giddings v. Cox*, 31 Id. 607; *Andrews v. The People*, 75 Ill. 605; *Thorpe v. Schooling*, 7 Nev. 15; *Broadbus v. Broadbus*, 10 Bush 299; *United States v. Cheeseman*, 3 Sawyer 424; *Devine v. Commissioners*, 84 Ill. 590; *Burgess v. Railroad Co.*, 18 Kan. 53; *People v. Brooklyn*, 69 N. Y. 605; *Breitung v. Lindauer*, 37 Mich. 217; *Ex parte Smith*, 40 Cal. 419; *Hogan v. Guion*, 29 Gratt. 705; *Stirman v. The State*, 21 Tex. 734; *Rogers v. Watrous*, 8 Id. 62; *Commonwealth v. Cromley*, 1 Ashm. 179; *Coghill v. The State*, 37 Ind. 113; *Longlais v. Longlais*, 48 Id. 60. See also *State v. Whitworth*, 8 Port. 434; *Norris v. Crocker*, 13 How. 429.

The same rule applies where the new statute covers the whole subject-matter of an English statute, adopted as law in this country: *Mason v. Waite*, 1 Pick. 452. So, the revision by the legislature of the state of Maine of the subject-matter of Massachusetts statutes in force in the former state, and the enactment of such provisions as the legislature deemed suitable to the wants of the people of Maine, was held to render the Massachusetts statutes no longer of force in Maine, though not expressly repealed: *Towle v. Marrett*, 3 Greenl. 22. But a mere change of phraseology in a revision will not alter the construction of the law, unless

it evidently appears that such was the intention of the legislature: *Matter of Brown*, 21 Wend. 316; *Theriat v. Hart*, 2 Hill 380; *Douglas v. Douglas*, 5 Hun 140; *Yates's Case*, 4 Johns. 359.

In Louisiana, however, it has been held that where the laws and jurisprudence of a country are reduced into the form of a code, without any clause of repeal, as was the case with the Code of 1808, the rule of interpretation must be as in cases of successive statutes, not to favor a repeal by implication, unless in case of manifest repugnance: *Lyon v. Fisk*, 1 La. Ann. 444.

It is held that a re-enactment in substance of an existing provision or section of a prior statute, in a later statute, is not a repeal of such provision or section: *Alexander v. The State*, 9 Ind. 337; *Corbett v. State*, 22 Id. 1; *Cheesem v. The State*, 2 Id. 149; *Martindale v. Martindale*, 10 Id. 566; *Waterworks Co. v. Burkhart*, 41 Id. 381; *Powers v. Shepard*, 48 N. Y. 540. Nor is the re-enactment of a former section in a later section of the same statute necessarily a repeal of the former section. The re-enactment may amount to nothing, and thus have no effect by way of repealing any former section: *Martindale v. Martindale*, 10 Ind. 566. In *Alexander v. The State*, 9 Ind. 337, the re-enactment of the former section contained an addition of new matter, and the decision was made under the provision of art. 4, sect. 21, of the state constitution, providing that in all amendatory acts the section amended should be set forth and published at full length in the new act. So, in New York, the amendment of a statute, or part of a statute, by making the same read as prescribed by the amendatory statute, thus incorporating all that is deemed desirable to retain of the old law in the new, is not regarded as a repeal of the parts thus transferred, but from the time of the passage of the new statute the whole

force of the enactment rests upon the later statute. Although the former act remains upon the statute-book and is not repealed, either expressly or by implication, it is no longer regarded as the law of the land in respect to new cases that may arise. The earlier act is merged in the amendatory act, and a repeal of the amendatory act does not revive the original act, but both fall together: *People v. Supervisors of Montgomery County*, 67 N. Y. 109. See also *Goodno v. Oshkosh*, 31 Wis. 127; *Kerlinger v. Barnes*, 14 Minn. 528; *Burwell v. Tullis*, 12 Id. 575; *Ely v. Holton*, 15 N. Y. 595. If, however, it appears that the legislature did not intend merely to repeat or copy the language of the original law, but, although using the same words, intended them to have a different meaning and effect, this rule is not applicable: *Kerlinger v. Barnes*, *supra*. Where, however, a subsequent act, providing that a certain section of a prior act shall thereafter read in a certain way, re-enacts some of its provisions, but omits others, it is a repeal of such omitted provisions: *The State v. Andrews*, 20 Tex. 230; *State v. Ingersall*, 17 Wis. 631; *Goodno v. Oshkosh*, 31 Id. 127; *Pingree v. Snell*, 42 Me. 55. The court, in *The State v. Andrews*, though it was not necessary to the decision of the cause, also laid down the rule, that the entire section thus re-enacted in the subsequent statute was thereby repealed. See, however, the cases already cited *contra*.

So, in *Ellis v. Paige*, 1 Pick. 45, it is said to be a well-settled rule that when any statute is revised, or one act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled. See also *Blackburn v. Walpole*, 9 Pick. 104; *Pingree v. Snell*, *supra*.

But the doctrine that a statute is impliedly repealed by a subsequent statute revising the whole subject-matter of the first, is not applicable where the revising statute declares what effect it is intended to have on the former, as where it provides that such provisions of the earlier as are inconsistent with the later are repealed. In such case only such effect can be given to the revising act as it directs, and only the inconsistent provisions of the earlier act are repealed: *Patterson v. Tatum*, 3 Sawyer 164. See also *McRae v. Wessel*, 6 Ired. Law 153. So, where a chapter of a revision of general statutes repealed all acts and parts of acts the subjects of which were revived and re-enacted in the revision, or which were repugnant to its provisions, it was held that this must be construed as referring to general statutes, and not as repealing all provisions of village and city charters, previously enacted, which were in conflict with the general statutes contained in said revision: *Walworth County v. Village of Whitewater*, 17 Wis. 193; *City of Janesville v. Markoe*, 18 Id. 350.

M. D. EWELL.

Supreme Court of Michigan.

LAKE SUPERIOR IRON CO. v. CATHARINE ERICKSON.

Where a mining company let a contract for taking out a certain quantity of ore, but employed persons of supposed skill to watch for dangers from loosened rocks, and in other ways retained a control over the mode of mining, and a servant of the contractors was killed by the falling of a rock, the danger from which ought to have been detected and guarded against: *Held*, that the mining company was responsible.

The question of negligence is generally one of fact, not of law.

It is not contributory negligence for a servant to go into a dangerous place in deference to the opinions of others who are supposed to have, and by their positions are bound to have, special knowledge which should enable them to judge of the dangers more accurately than the servant himself.

THE defendant in error recovered a judgment, in the court below, as administratrix of her deceased husband, Andrew Erickson, who was killed by a falling rock, while engaged in working in the mine of the plaintiff in error, July 9th 1877.

It appeared that Erickson had been employed, the day before his death, as one of a mining gang, under the management chiefly of Gustav Stenson, who, with his partners, had taken a contract for mining and hoisting ore, at ninety-five cents per ton for ore, and twenty-five cents per ton for rock. This contract having been made July 1st 1877, for a month, and similar contracts having been made in previous months, from the beginning of April. Erickson was employed by the day, at \$1.50 per day. The pay arrangement was, that the company officers were to pay the men on the certificates of the contractors, deducting this pay from the final settlements.

These contracts were all let by Day and McEncroe, as officers of the company, who had general charge, for the company, of the affairs in the mine.

The pit where these contractors were at work had been carried along the lode so as to leave the upper or hanging wall, which was at an angle of sixty-five degrees, exposed from twenty to twenty-five feet high, and not far from the same distance along the level, with no support or timbering of the hanging wall in that space. Erickson was engaged in sinking a winze or ventilating shaft from this level, and had sunk it about two feet and eight inches when killed. The rock which killed him fell from about half way up the hanging wall, and was just over the winze.

The chief controversy related to the question whether this rock was previously in a condition which made it so apparently dangerous as to require removal or timbering; and, if so, on whom, if any one, was the risk and responsibility?

The opinion of the court was delivered by

CAMPBELL, J.—Upon a careful inspection of the record we do not think any questions become material except those which bear on the rights and duties of the various parties in connection with the mine.

The other errors assigned do not appear to be founded on sufficient showing in the record. The only one urged by counsel was the rejection of a question put on cross-examination to Stenson, asking him whether it was not his business, and that of his associates, to be on the lookout and watch for dangerous places. We think that, when the terms and conditions of his contract were shown, this was rather a deduction than a fact, and he could not properly be allowed or required to answer it. He was not precluded from explaining fully the mutual understanding of the contracting parties as to what the contract was, or as to usage.

It was claimed on the argument and this claim is based on the assignments of error, that on the whole case there was no ground of recovery. And as reasons for this position several legal propositions are advanced, which are chiefly as follows: that there could be no recovery if Erickson was in the employ of Stenson as a day laborer; or if he was not under control of the company or its officers, and if Stenson and his associates were to mine and do their work properly; or if he was willing to work after such examination as was shown. And it was claimed in various forms that Erickson undertook all the risks that were established. It will be more convenient to refer to the points raised in the way adopted by counsel, than to pursue every sub-division separately.

There was evidence that the rock in question had been considered as dangerous some time before the contract of July, and that the attention of Day and McEncroe had been called to it. There was evidence of various attempts, by sounding it with an iron bar, to ascertain its safety. There was conflicting evidence as to some of the declarations of the mining officers on this subject. There was evidence on one side that they expressed themselves decidedly on its safety. There was also evidence to go to the jury that they retained the right to determine what large rocks should be removed and what timbering or propping should be done. There was also testimony of the increase of water oozing from the seams, claimed to indicate a gradual loosening. The theory of plaintiff in error was that the rock had been started by blasts from the winze, and that sufficient care had not been taken to examine it thereafter. It fell about two hours after a blast. Other matters of fact will be referred to in their place.

It is proper first to consider the respective positions of the parties. Day and McEncroe stood in the place of the mining company in

making these contracts. There was no employment relation between them and Erickson, who was laboring under the contractors. So far as this changed the relative liabilities of the parties it must operate in this case. But while there are cases in which there is no legal duty or privity between principals and the servants of those who contract with them, this lack of privity is not universal and absolute. If, for example, a railroad company were to contract with a firm of car-builders to build cars according to given plans in places under the entire control of the builders, there could be no possible corporate responsibility for injuries received by workmen in their callings. But on the other hand it might be quite possible for men to be employed in piece work in the shops of such companies where they retained more or less control, when for the failure of a corporate duty the workmen or strangers injured by that failure might have a cause of action for the wrong directly against the corporation, although it had not employed them. The case of the *City of Detroit v. Corey*, 9 Mich. 165, is a case where the corporation was held liable for neglect of a contractor in not properly guarding against danger from an excavation in a public street. The same principle was applied in *Darmstetter v. Moynahan*, 27 Mich. 188; *McWilliams v. Detroit Central Mills Co.*, 31 Id. 274; *Gardner v. Smith*, 7 Id. 410; *Bay City & E. Sag. Railroad Co. v. Austin*, 21 Id. 390; *Continental Imp. Co. v. Ives*, 30 Id. 448; *G. R. & Ind. Railroad Co. v. Southwick*, 30 Id. 444.

No doubt the range of the owner's responsibility is very much less in most cases where contractors are employed and have their own servants at work than where the servants are employed by the proprietors. The main question in such cases is whether any duty remained which sprang from the proprietor's own position, and from the violation of which the damage arose. In the present case there are two principal inquiries, which are (1) whether the death of Erickson was due to the fault of the mining company in not doing what they were bound to do for the protection of those working in their mines: and (2) whether Erickson himself was responsible for running the risk which proved fatal. Of course both of these questions are aside from the third question, whether the death was accidental, and not due to the fault of any one.

The court below told the jury that there could be no recovery in this case if the duty was on Stenson and his associates to guard against such risks, and that the same was true if Erickson contrib-

uted to the injury by his own want of care. They were also told that there was no ground of recovery if the falling of the rock was not under circumstances which showed that the company had been guilty of such negligence as showed such want of care and caution as prudent persons would not be guilty of. They were particularly directed that unless the conduct of Day and McEncroe was thus negligent and the cause of the mischief, there could be no recovery, and that the company would be liable for their neglect or misconduct and not for that of any one else appearing in the case.

We think the court was correct in holding that Day and McEncroe represented the company for this purpose. They appear to have had entire control of all the business that is involved in the record, and we think there is no room to question the propriety of these rulings if they were applicable, and not neutralized by other instructions. In this connection it is proper to notice one of the special assignments of error which is calculated to give a wrong impression. The court is represented as telling the jury to inquire whether the company used such care and precautions as "relieved them from liability in this suit," and it is claimed this left a question of law to the jury. But the next sentence of the charge explained what would or would not make them liable. Isolated sentences cannot be allowed to be considered apart from their context. The instructions were not so separated as to create confusion, but were really but a single and correct ruling.

We think that unless the case was one too plain to go to the jury on that point, it was properly left to them to say whether the accident occurred without any one's fault or neglect. It is not for us to draw inferences of fact in such cases. There was certainly evidence to go to the jury indicating that there should have been measures taken by some one to either remove or prop the rock that fell.

We think also that there was properly before them a question whether Erickson himself was guilty of contributory negligence. A great deal of testimony was introduced to show that there was no apparent danger which could be discovered, and that the company was justified in treating the rock as safe. There was also much testimony to the contrary. The place was one not easily examined by the ordinary mining lights. If there was no apparent danger it was not recklessness to work under this rock. If, on the other hand, there was real danger, and Erickson was informed

of it on the day he entered the mine, there was nevertheless evidence that those about him who had practical knowledge of the mine in which he was a stranger, acted as if they did not think so, and the guards, usually expected against danger, were absent. The duty of examining such places after a blast is confined by the testimony to dangerous places, and not made out clearly even there as devolving on Erickson. The jury have necessarily found he was not careless, and there was testimony on which they could lawfully act.

The question next arises whether the responsibility of protecting Erickson from such a danger, if supposed to exist, rested on his immediate employers. This was also dependent on testimony, and involved some inquiry into their relations with the company.

Does it then appear so to bind the court and jury that the contractors in this particular service had the responsibility confined to them of guarding their workmen from the probable dangers of their employment? There is no dispute in this case upon the general principle of law that a responsibility lies somewhere to prevent workmen from being exposed without such protection as is reasonably required in a dangerous business. The law is very clear that it is culpable negligence to avoid keeping mining works as well protected as usual prudence would dictate. And there is no doubt that a common danger in mines is from falling rocks. The hanging wall being on an angle—in this instance of sixty-five degrees—with the level, any lack of cohesion in its parts must lead to the fall of such part of it as is seriously loosened, and that fall must be hastened by the concussion of the air or the blows of flying rocks thrown against it by blasting below and near it. In the present case the rock which fell being directly above the winze, and only about twelve feet from its mouth, every blast in that shaft would necessarily throw more or less rock against this sloping roof; and this must continue until the shaft is either finished or opened to such a depth as to deaden or destroy the upward force of the explosions.

The fact that this rock was considered dangerous, and so reported several weeks before the accident, and the further fact if true (and the jury probably believed them) that there was a perceptible increase in the dangerous symptoms, certainly imposed a duty of either removing the real dangers or using such means as are generally deemed adequate to determine whether any danger existed. The further fact that the hanging wall was composed of a species

of rock whose thickness was not found generally uniform, and which was sometimes thin enough to possess no very great resisting power to shocks of disintegrating agencies, was one which could not be left out of view by any prudent calculation. A broad expanse of some twenty-five feet square of rock, only supported by its own cohesive power from falling, may, according to the testimony, have weak points where it may give way unless propped, or unless the unreliable mass is removed. There was testimony, which it is not our province to pass upon, which indicated, if believed, that no reliable test could be found for determining the solidity of the rock when water was escaping through such seams as existed in this wall.

We think there was a question fairly open whether neglect to guard against the accident was not culpable. The jury have found it was.

If so, the only remaining question is whether the jury had proof before them whereby they could lawfully hold the company to this responsibility.

Under the contracts shown by the proofs, the contractors had nothing to do with planning the mine or selecting their working ground, unless with very small discretionary choice. The shafts and levels and the winze must necessarily have been determined on by the owners of the mine, and the mining gang worked on short contracts. Their business, except in sinking the winze, was merely stripping the lode of its ore, and the winze was apparently, as it must usually be, down the lode. The pay for getting out dead rock was but little beyond one-fourth that of getting out ore, and work in the rock outside of the lode was not contemplated. They testified, and the jury must have believed them, that the company reserved the power of determining when and where dangerous rock in the wall should be removed, if requiring removal by blasting, and of locating the supporting pillars or placing timbers to prop the wall. Such timbering would be expensive, and is not provided for by the contracts, which are confined to rock and ore blasting and removal. Either the mine must be unguarded, or else, on this state of facts, the company must guard it.

Under such circumstances it is very plain that the company, being the owners of the dangerous property, and inviting men to work on it, their responsibility for its protection cannot be changed by the fact that the work is done by the ton instead of by the day,

or by the fact that the men who contract with them have laborers of their own. By employing men to act for them in either way they hold out the assurance that they can work in the mine on the ordinary conditions of safety usually found in such places. They guarantee nothing more than is usual among prudent owners, and they do not insure against that which is purely accidental. But they do tacitly represent that they have not been and will not be reckless themselves.

If men choose with their own eyes open to run into danger they may forfeit claims to redress. But it cannot be considered reckless in men who are in doubt upon a matter which cannot be determined absolutely, to pay some regard to the opinions and assurances of those who are supposed to have and by their position are bound to have special knowledge called for by their larger responsibilities. In the present case the assurances of safety given by the mining agents cannot be disregarded, and were rightly subject to consideration by the jury.

We think the jury were very carefully and correctly instructed concerning their duty, and that there was testimony which warranted their verdict.

There is no error in the record, and the judgment must be affirmed with costs.

The importance of the point involved in the foregoing opinion will justify inviting attention to other cases more or less analogous. For convenience these will be classified under appropriate heads.

1. The owner of lands is under no obligation to protect trespassers against dangers in coming upon them. If, therefore, persons intentionally come upon his lands without his permission and without lawful right, and fall into pits or encounter other dangers, he is not responsible, even though he may have been grossly careless in leaving the pits uncovered or the other dangers unguarded: *Hounsell v. Smyth*, 7 C. B. N. S. 731; *Stone v. Jackson*, 16 C. B. 199; *Hunt v. London, &c., Railway Co.*, 1 Q. B. 277; *John v. Bacon*, Law Rep. 5 C. B. 437; *Vanderbeck v. Henry*, 34 N. J. 467; *Hargreaves v. Deacon*, 25

Mich. 1. This rule has been applied to children, who were tempted to meddle with exposed machinery, and were injured thereby: *Mangan v. Atterton*, Law Rep. 1 Exch. 239; *Wood v. School District*, 44 Iowa 27. Compare *Keefe v. Milwaukee, &c., Railroad Co.*, 21 Minn. 207. And to a servant, who fell through a scuttle when moving about for curiosity: *Severy v. Nickerson*, 120 Mass. 306.

2. But if one either expressly or by implication invites another upon his premises, for business or pleasure, or other reason, he by so doing assumes the duty to guard the other against dangers which might be encountered in accepting the invitation, or at least to warn the person invited of their existence, that he may avoid them. This point is strongly put in some cases, where persons have been injured in ap-

proaching the stations of railroad companies, by reason of their platforms or other approaches being out of repair : *Smith v. London, &c., Railway Co.*, Law Rep. 3 C. P. 326 ; *Tobin v. Portland, &c., Railroad Co.*, 59 Me. 183 ; *McDonald v. Chicago, &c., Railroad Co.*, 26 Iowa 124 ; *Mich. Cent. Railroad Co. v. Coleman*, 28 Mich. 440 ; *Chicago, &c., Railroad Co. v. Wilson*, 63 Ill. 167 ; *Swords v. Edgar*, 59 N. Y. 28. The obligation in this regard extends to those who come to welcome others, or to assist others in leaving : *Doss v. Missouri, &c., Railroad Co.*, 59 Mo. 27 ; but not to those who gather in a crowd to witness a passing parade, and are injured by the giving way of the platform : *Gillis v. Pennsylvania Railroad Co.*, 59 Penna. St. 129. It is said in this last case that if a traveller by foot on the open track of a railroad crosses a bridge which ought to be, but is not, in its ordinary use, strong enough to bear a locomotive and train of cars, and a rotten board breaks down under him, the company are not liable to him, for they owe him no duty. See further as to the general principle, *Bush v. Steinman*, 1 Bos. & P. 404 ; *Southcote v. Stanley*, 1 H. & N. 247 ; *Indermaur v. Dames*, Law Rep. 1 C. P. 274 ; s. c. Law Rep. 2 C. P. 181 ; *Chipman v. Rothwell*, E., B. & E. 168 ; *Francis v. Cockrell*, Law Rep. 5 Q. B. 184 ; *El liott v. Pray*, 10 Allen 378 ; *Freer v. Cameron*, 4 Rich. 228 ; *Latham v. Roach*, 72 Ill. 179 ; *Sweeney v. Old Colony Railroad Co.*, 10 Allen 368 ; *Pierce v. Whitcomb*, 48 Vt. 127.

3. The duty not to expose others to unknown dangers on one's own premises is as much a duty to servants as to any others ; for, though by their contract of service they take upon themselves all the risks properly incident to it, yet the negligence of the master is not one of these, and if he sends his servants into dangers to them unknown, and which they had no reason to look

for, he will be held responsible for the consequences : *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572 ; *Grizzle v. Frost*, 3 Post. & F. 622 ; *Bartonskill Coal Co. v. McGuire*, 3 Macq. H. L. 300 ; *Malone v. Hawley*, 46 Cal. 408 ; *Baltimore, &c., Railroad Co. v. Woodward*, 41 Md. 268 ; *Perry v. Marsh*, 25 Ala. 659 ; *Strahlendorf v. Rosenthal*, 30 Wis. 674 ; *Paulmeier v. Erie Railway*, 34 N. J. 151 ; *Illinois Central Railroad Co. v. Welch*, 52 Ill. 183 ; *Snow v. Housatonic Railroad Co.*, 8 Allen 441 ; *Lanning v. New York Central Railroad Co.*, 49 N. Y. 521 ; *Louisville, &c., Railroad Co. v. Caven*, 9 Bush 559 ; *Coughly v. Globe Woollen Co.*, 56 N. Y. 124 ; *Bech v. Carter*, 68 Id. 283 ; *Deford v. Keyser*, 30 Md. 179 ; *Godley v. Hagarty*, 20 Penna. St. 387. The rule has been applied to a railroad company sending out cars upon a track blocked with snow and ice, in consequence of which plaintiff was injured : *Fifield v. Northern Railroad Co.*, 42 N. H. 225.

4. Where one is doing work under a contract upon the land of another, the primary obligation to protect his laborers no doubt rests upon the contractor rather than upon the landowner, but this is liable to be controlled by circumstances. The obligation to give warning of all dangers not apparent, is one he owes to the contractor as much as to his own servants, and to those employed by the contractor to the same extent and for the same reasons. The duty is of course very plain where, as in the principle case, the landowner takes upon himself the obligation of watchfulness, and it then corresponds to that of a landlord who, in leasing premises, covenants to keep them in repair, and is held liable to third persons who are injured by his failure to keep the covenant : *Burdick v. Cheadle*, 26 Ohio (N. S.) 393 ; *Campbell v. Sugar Co.*, 62 Me. 552 ; *Owings v. Jones*, 9 Md. 108 ; *Grady v. Wulsner*, 46 Ala. 381.

5. How far one may be liable to those who are injured in coming upon his premises under license of the law is a question not discussed in the books. Suppose, for example, that a traveller finds the highway impassible, and in passing around the obstruction on private grounds, as he lawfully may, he falls into an unguarded pit, can the owner of the land be held liable for his injury? Or an officer enters his house to serve a writ, and is precipitated through a trap-door, can the owner be made responsible as for negligence? The question is one of no little interest; for while the party injured is in the exercise of a legal right, it must be conceded that the other, as a general rule, may leave his premises in any condition he pleases, provided he does nothing, expressly or by implication, to bring others into danger upon them. It was

held in *Laverone v. Maugianti*, 41 Cal. 138, that one who keeps a vicious dog, as a watch-dog, is liable to one who, by accident, is put within the dog's reach and is injured; but that was upon the ground that he had no right to keep the vicious dog at all. But doubtless a man may keep a dangerous dog upon his premises as lawfully as any other danger, if he gives due warning to those who might come within his reach: see *Sack v. Blackburn*, 4 C. & P. 297; *Curtis v. Mills*, 5 Id. 489. But beyond any question, we should say, he would be liable to one who, visiting his premises by license of the law, should be assailed by a vicious animal of any sort, kept by the owner with knowledge of his vicious propensity: see *Blackman v. Simmons*, 3 C. & P. 138; *Sherfey v. Bartley*, 4 Sneed 58; *Loomis v. Terry*, 17 Wend. 496. T. M. C.

U. S. Circuit Court, Eastern District of Wisconsin.

B. LEIDERSDORF ET AL. v. J. G. FLINT.

The maker of a trade-mark is neither an author nor an inventor, and a trade-mark is neither a writing nor a discovery, within the meaning of the provision of the Constitution giving to Congress jurisdiction over the subject of copyrights and patents.

Congress, therefore, has no jurisdiction over the subject of trade-marks, and so much of title 60 of the Revised Statutes as relates to trade-marks is unconstitutional and void.

In Equity. This was a bill for an injunction to restrain an alleged infringement by defendant of complainants' trade-mark, used upon packages of tobacco, and registered according to act of Congress. Both complainants and defendant were citizens of Wisconsin, and the bill was based upon that provision of section 4942, Revised Statutes, which gives to a party aggrieved by the wrongful use of his trade-mark, a remedy by injunction, according to the course of equity, in any court having jurisdiction over the person guilty of such wrongful use, and was filed upon the theory that this court had jurisdiction to entertain such a bill, though both parties are citizens of the same state.

Carpenter & Smiths, for complainant.

Jenkins, Elliott & Winkler, for defendant.

The opinion of the court was delivered by

DYER, J.—The bill is demurred to on the ground that the court has no jurisdiction, and the demurrer raises the question of the constitutional power of Congress to legislate upon the subject of trade-marks. The question is important, and appears to be new, since, with the exception of *Duwell v. Bohmer*, 10 C. L. N. 356, we were referred, upon the argument, to no reported case in which it has been determined.

The statutory provisions relating to trade-marks are contained in Title 60, Revised Statutes, which is entitled, "Patents, trade-marks, and copyrights." They authorize the registration of trade-marks, impose restrictions upon such registration, and confer certain remedies for the protection of the rights of parties who have complied with the requirements of the statute. The remedies thus given are mentioned in section 4942, which provides that "any person who shall reproduce, counterfeit, copy or imitate any recorded trade-mark, and affix the same to goods of substantially the same descriptive properties and qualities as those referred to in the registration, shall be liable to an action on the case for damages, for such wrongful use of such trade-mark, at the suit of the owner thereof; and the party aggrieved shall also have his remedy according to the course of equity, to enjoin the wrongful use of his trade-mark, and to recover compensation therefor, in any court having jurisdiction over the person guilty of such wrongful use."

The only clause in the Constitution from which it can be claimed Congress derives its power to legislate upon the subject, is art. 1, sect. 8, clause 8, which authorizes Congress "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." If the power in question is given by this clause of the Constitution, then, inasmuch as by section 629 of the Revised Statutes the Circuit Courts are invested with original jurisdiction of all suits at law or in equity arising under the patent or copyright laws of the United States, and in view of the act of Congress of March 3d 1875, which confers jurisdiction in all civil cases arising under any law of the United States where the amount

in dispute exceeds \$500, and of the provisions of section 4942, Revised Statutes, above referred to, there is ground for claiming that the United States courts have jurisdiction in suits which involve the right to trade-marks, without regard to the citizenship of parties.

But in contending that the power to legislate upon the subject of trade-marks is derived from the constitutional provision before cited, it must be necessarily assumed that the maker of a trade-mark is an author or inventor, and that a trade-mark is a writing or discovery within the meaning of that clause.

Argument, we think, can hardly be needed to demonstrate that a law regulating trade-marks is not in any just sense a copyright law. The general meaning of the term copyright is an author's exclusive right of property in the work which he produces. It includes the right of the citizen who is an author of any book or writing, any literary, dramatic or musical composition, any engraving, painting, drawing, map, chart or print, and of models or designs intended as works of art. It is something which appertains to authors who, by their writings and designs, promote the advancement of literature, science and the useful arts. An author, by standard definition, is "one who produces, creates or brings into being; the beginner, former or first mover of anything; hence the efficient cause of a thing." The term is appropriately applied to one who composes or writes a book "or writing," and in a more general sense, to one whose occupation is to compose and write books "or writings."

So, too, invention implies originality. Originality, not merely mechanical dexterity, is the test of invention: *Blake v. Stafford*, 3 Fisher 305. It is the "finding out, contriving, creating of something which did not exist, and was not known before, and which can be made useful and advantageous in the pursuits of life, or which can add to the enjoyments of mankind:" *Conover v. Roach*, 4 Fisher 16; *Ransom v. Mayor of N. Y.*, 1 Fisher 264. "To entitle one to the character of an inventor, he must himself have conceived the idea embodied in his improvement. It must be the product of his own mind and genius:" *Pitts v. Hall*, 2 Blatchf. 234.

The dissimilar characteristics of trade-marks and copyrights, and inventions for which patents may be granted, have been pointed out or illustrated in various adjudicated cases. A trade-mark has been very well defined as one's commercial signature to

his goods. It may consist of a name, symbol, figure, letter, form or device, if adopted and used by a manufacturer or merchant, in order to designate the goods he manufactures or sells, to distinguish the same from those manufactured or sold by another, so that the goods may be known in the market as his, and to enable him to secure such profits as result from his reputation for skill, industry and fidelity: *McLean v. Fleming*, 6 Otto 254; Upton, Trade Marks 9; *Taylor v. Carpenter*, 2 Sandf. 603.

The basis of trade-mark right is, primarily, the encouragement of trade. As the court in discussing the subject say, in *Partridge v. Mench*, 2 Paige 103, the question in such a case is not whether a person was the original inventor or proprietor of the article made by him and upon which he puts his trade-mark, nor whether the article made and sold by another, under his trade-mark, is an article of the same quality or value. But the court proceeds upon the ground that the complainant has a valuable interest in the good-will of his trade or business, and that having appropriated to himself a particular label or sign or trade-mark, indicating that the article is manufactured or sold by him or by his authority, or that he carries on his business at a particular place, he is entitled to protection against any other person who pirates upon the good-will of his customers, or of the patrons of his trade or business, by sailing under his flag without his authority or consent.

The name, word, mark, device or symbol constituting a trade-mark, may be devoid of novelty, originality, and of anything partaking of the nature of invention. As the Supreme Court say, in *Canal Company v. Clark*, 13 Wall. 322, undoubtedly words or devices may be adopted as trade-marks which are not originally inventions of him who adopted them. Property in a trade-mark, or, rather, in the use of a trade-mark or name, has very little analogy to that which exists in copyrights, or in patents for inventions. Words in common use, with some exceptions, may be adopted, if, at the time of their adoption, they were not employed to designate the same or like articles of production. So, in *McLean v. Fleming*, *supra*, it is said that trade-marks are not required to be new, and may not involve the least invention or skill in their application or discovery.

As is well shown by a writer who has, with evident care, collected the authorities on this subject, vol. 7, C. L. J. 143, the foundation of title to a trade-mark is priority of adoption and

actual use in trade, and it neither in application nor discovery necessarily possesses the elements of originality, novelty or invention. The power given to Congress to promote the progress of science and useful arts is restricted to the rights of *authors* and *inventors*, and further, their rights are only to be secured for a *limited time*: *Livingston v. Van Ingen*, 9 Johns. 566. This limitation in time is imposed by the constitutional provision itself. But the right to a trade-mark is of common-law origin, and as a common-law right is limited only by the period of its use, and ceases only with its abandonment. Property in inventions and discoveries did not exist at common law, and for their protection we have to look wholly to the constitutional provision on the subject.

The consideration for which a grant is made by the public to the author of a new and useful invention, of an exclusive right, is the benefit resulting to the public from the invention. The consent of the inventor to make his invention known and available to others, and ultimately to give it to the public, constitutes the consideration for which he is entitled to receive protection from the government in the form of the grant of an exclusive right: Curtis on Patents, preface. Not so with trade-marks; for when the exclusive right to use a trade-mark terminates, no corresponding benefit results to the public. Its value is gone when it ceases to be exclusive and becomes the property of the public.

Mr. Browne, in his treatise on Trade-Marks, says: "The rights of inventors and authors, as long settled in Great Britain, were familiar to the framers of the Constitution; and as Mr. Justice STORY says, it is doubtless to this knowledge of the common law, and statutable rights of authors and inventors, that we are to attribute the constitutional provision being beneficial to all parties. It was beneficial to authors and inventors because it maintained their rights to the product of their intellectual labor; and beneficial to the public, as it would promote the progress of science and the useful arts, and admit the people at large, after a short interval, to the full possession and enjoyment of all writings and inventions, without restraint. In short, the only boon which could be offered to inventors to disclose the secrets of their discoveries, would be the exclusive right and profit of them, as monopoly for a limited period. A copyright is limited by time; a trade-mark is not. A copyright is limited territorially; but a trade-mark acknowledges no boundaries. They are unlike in their natures."

In every aspect suggested, and in other respects which might be suggested, it would seem that the analogy between property in the use of a trade-mark and a patent for an invention, and between a trade-mark right and a copyright, fails. Property in a trade-mark exists independently of statute. It is otherwise with inventions and discoveries. They, as is said by the court in *Rodgers et al. v. Philip et al.*, 1 Off. Gaz. 31, "are protected only in consequence of the constitutional provision on the subject, which does not apply to trade-marks."

Considering with care the important question involved, and not unmindful that the question whether a law be void for repugnancy to the Constitution, or for want of constitutional authority to enact it, is at all times one of much delicacy, I am constrained to hold that legislation by Congress upon the subject of trade-marks is not authorized either by the letter or spirit of the constitutional provision from which such authority is sought to be deduced. The maker of a trade-mark is neither an author nor inventor, and a trade-mark is neither a writing nor a discovery, within the meaning and intent of the constitutional clause in question.

It may be added that the constitutionality of the trade-mark statute cannot be sustained under the clause which gives to Congress the power to regulate commerce among the several states, nor in my opinion, under any of the provisions of the Constitution which prescribe the legislative powers of Congress.

From these views it follows that this court is without jurisdiction to entertain the present controversy, which, as before stated, is between citizens of the same state.

Demurrer to bill sustained.

In this opinion Justice HARLAN, who sat at the hearing, concurred.

The importance of trade-marks and the value of the interests involved in them are shown by the increasing frequency of litigation in both state and national courts during the last few years. It is clear from the general current of such litigation and the professional efforts to get the cases into the courts of the United States, that both in the legal profession and in the business community there has been felt a want

of a more comprehensive and uniform, and perhaps more convenient and available jurisdiction over the subject than is afforded by the common law.

That this feeling was generally entertained, and that the Act of Congress was appreciated as in some degree a satisfaction of it, is shown by the large number of trade-marks registered under the act, amounting to nearly fifteen hundred a year, and apparently increas-

ing as the community was becoming familiar with the scope and usefulness of the statute.

The sudden breaking down, therefore, of this statute, for want of constitutional jurisdiction over the subject-matter by Congress, is a matter of very serious concern, not to say regret.

There seems, however, to be room for great doubt whether the control over patents and copyrights, given by the constitution to the national legislature, was intended by the framers of that instrument, or can be fairly held to cover a subject-matter presenting so many essential differences as that of trade-marks.

The only reported case on the subject, prior to the present, is *Duwell v. Bohmer*, 10 Chicago Leg. News 356. That was a bill for injunction in the Circuit Court of the United States, for the Southern District of Ohio. The defendants demurred, and assigned for ground of demurrer the want of jurisdiction in the court, the parties being all citizens of the same state, and "there being no act which confers upon the United States courts jurisdiction of the subject-matter in such a case." The stress of the argument in the case was upon the statutes giving jurisdiction to the circuit courts, and the nature of trade-marks as related to patents and copyrights did not receive the same amount of consideration as in the prin-

icipal case. But the point was clearly involved, and is so recognised by *Swing, J.*, who says: "The copyright and trade-mark laws all come from the same source. So if the trade-mark law of 1870 be a copyright law, then the court has jurisdiction, without reference to residence or the amount in controversy." The learned judge then proceeds to review the laws, and sustains the jurisdiction upon the ground that the Act of 1870, being *in pari materia*, is a copyright law. The decision, therefore, as an authority, is in direct conflict with the principal case.

Since the principal case was decided, the same view has been announced in the Circuit Court for the Eastern District of Pennsylvania, in *Day et al. v. Walls*, 35 Legal Intelligencer 468. In that case a bill for injunction was, upon demurrer, dismissed for want of jurisdiction, the parties being all citizens of Pennsylvania. No opinion was delivered by the court, but *CADWALADER, J.*, said that he entertained the same view as *DYER, J.*, and had acted upon it in several cases previously.

The question may, therefore, be regarded as still unsettled, but the tendency and the weight of judicial opinion would seem to be against the validity of the legislation of Congress on the subject.

J. T. M.

Supreme Court of Kansas.

THE STATE OF KANSAS, EX REL. ATTORNEY-GENERAL, v. L. H. STEVENS ET AL.

Notwithstanding the records purporting to show a valid organization of a county may be forged, and the necessary facts in regard to such organization may not exist, yet any action of the legislative department of the state government subsequently recognising the existence of such organized county, will be effective to validate the organization.

A municipal corporation does not forfeit its corporate existence by non-user.

THIS was a proceeding in the nature of a quo warranto, to oust from office the County Commissioners, Sheriff and Probate Judge of Harper county.

Willard Davis, Attorney-General, for the state.

Peck, Ryan & Johnson, for defendants.

The opinion of the court was delivered by

HORTON, C. J.—The confessed object of the institution of the action is to legally determine whether the county of Harper had a valid organization as a county. The records of the organization of date of August 20th 1873, would seem to be regular and valid upon their face; yet it is admitted by all the parties to the suit that these papers were forged; that there were not twenty residents or householders in the county at the signing of the memorial or the taking of the census. The records purporting to show a valid organization are simply "The refuge of lies and the hiding-place of falsehoods." If this were all that was apparent in the case, then, within the principle of the *State v. Ford County*, 12 Kan. 441, and *State v. Sillon*, just decided, we would be compelled to hold the organization of the county void and the defendants wrongfully exercising the duties of the offices named. But the legislature has intervened since the so-called organization was had, and by its action recognised, ratified and made valid that which was fraudulent in its inception.

At its session, commencing January 10th 1874, William H. Horner was admitted as a member of the legislature, and as a representative therein from said county of Harper, and served as such member during the entire session of 1874.

By section 28, chapter 77, laws of 1874, the Board of County Commissioners of Harper county, was authorized and empowered to issue and sell or exchange the bonds of the county to an amount not exceeding the sum of \$15,000, or so much thereof as might be necessary for the purpose of funding certain outstanding county warrants to pay the current expenses of the county for the year 1874. This act pre-supposed the existence at some prior time of a county organization and a county tribunal that transacted county business. From August 20th 1873, to September 1st 1873, at least, there was a de facto organization of the county in existence. The governor then recognised the organization as valid, and had

it proclaimed to be valid and complete. Within the principle of the *State v. Pawnee County*, 12 Kansas 426, we hold that the legislative recognition of the validity of such county organization made the same valid, although the original organization was defective and fraudulent. It is contended, however, by the counsel for the state, that if a *de facto* organization was instituted on the 20th of August 1873, it was confessedly only temporary, and as there never was any election in the county since, and as there have not been since about September 1st 1873, up to August 5th 1878, any officers in the county that said temporary and fraudulent organization ended in September 1873, and the legislative recognition in 1874 had no effect to legalize or validate it.

The reasoning is not sound. For a time, though a brief one, a *de facto* organization actually existed. The legislature having the whole control of the matter, recognised thereafter such organization, in ch. 77, laws of 1874, and thereby ratified it; whatever the actual facts may be, we are bound to presume that the legislature of 1874 had full knowledge of the situation of affairs in the county, and passed the act of that year with a complete understanding of its consequences. The removal of the officers from the county, and the failure to elect officers, did not blot out or destroy the organization given life by the legislative recognition.

Dillon says: "Municipal corporations may become inert, or dormant, or their functions may be suspended for want of officers or inhabitants, but dissolved when created by any act of the legislature, and once in existence they cannot be, by reason of any default or abuse of powers conferred, either on the part of the officers or inhabitants of the incorporated place. As they can exist only by legislative sanction, so they cannot be dissolved except by legislative consent or pursuant to legislative provision." Dillon on Munic. Corp., vol. 1, sec. 115.

The same principle is applicable to counties which are *quasi* corporations, created by the sovereign power of the state, of its own sovereign will, for the purposes of civil administration.

The point made that there never was any *de facto* organization, for the reason that the persons appointed special county officers in August 1873, were not residents and qualified electors of the county, and were never there, is not well taken, as the record of the case does not support this assertion. The answer alleges that these officers were appointed by Governor Osborn and afterwards

removed from the county, and no testimony has been offered contrary to these allegations.

Judgment will therefore be duly rendered in favor of defendants for all costs.

Municipal corporations existing and exercising powers bestowed upon them for public purposes may be altered, modified, or abolished by the legislatures: *People v. Wren*, 5 Ill. (4 Scam.) 269; *Richland v. Lawrence*, 12 Id. 1; *People v. Power*, 25 Id. 169; *Clinton v. Cedar Rapids, &c., Railroad Co.*, 24 Iowa 455; *Reynolds v. Baldwin*, 1 La. Ann. 162; *Police Jury v. Shreveport*, 5 Id. 664; *Layton v. New Orleans*, 12 Id. 515; *Berlin v. Gorham*, 34 N. H. 266; *People v. Pinckney*, 32 N. Y. 377; *Montpelier v. East Montpelier*, 29 Vt. 12; *State v. Branin*, 23 N. J. L. 484; *Lynch v. Laflund*, 4 Cold. (Tenn.) 56; *Waring v. Mayor, &c.*, 24 Ala. 701; *Sloan v. State*, 8 Blackf. (Ind.) 361; *Smith v. Adrian*, 1 Mich. 495; *Marietta v. Fearing*, 4 Ohio 427; *Cobb v. Kingman*, 15 Mass. 197; *Barnes v. District of Columbia*, 91 U. S. (1 Otto) 540; and it follows, as a corollary to this proposition, that where such corporation has been recognised by enactments of the General Assembly, all inquiry into the regularity of its organization is precluded; *People v. Farnham*, 35 Ill. 562; *Kanawha, &c., v. Kanawha, &c.*, 7 Blackf. 391, 406; *Syracuse City Bank v. Davis*, 16 Barb. 188.

These corporations are created for the public good, and not for the benefit of corporators: *Herbert v. Benson*, 2 La. Ann. 770; *Police Jury v. Shreveport*, 5 Id. 664; *People v. Farnham*, 35 Ill. 562; and, therefore, after long continued use of corporate powers and the public acquiescence, the law will presume in favor of their legal existence: *Jameson v. People*, 16 Ill. 257. It is the citizens of the city and not the officers who constitute the corporation. The officers are merely the agents of the corpora-

tion: *Lowber v. Mayor, &c., of New York*, 5 Abb. Pr. 325; *Clarke v. City of Rochester*, 24 Barb. 446; s. c., 14 How. Pr. 193. It would seem to follow from these well-established principles, that no default or abuse of powers, on the part of the officers of such a corporation, can work a dissolution or constitute a ground of forfeiture.

In England a municipal corporation may be dissolved:

(1) *By an act of parliament*: 2 Kyd 447; Coke Litt. 176 and note; *Rex v. Amery*, 2 Term Rep. 515; Glover 408; *Angell & Ames*, § 767; 2 Kent 305; *County Com'rs v. Cor*, 6 Ind. 403; *State v. Trustees, &c.*, 5 Id. 77.

(2) *By the loss of an integral part*: *Rex v. Morris*, 3 East 215; *Rex v. Stewart*, 4 Id. 17; *Rex v. Passmore*, 2 Term R. 241; *Regina v. Bawley*, 1 P. Wms. 207; *Banbury Case*, 10 Mod. 346; *Rex v. Tregony*, 8 Id. 129; *Colchester v. Leazer*, 3 Burr. 1870; *Bacon v. Robertson*, 18 How. 480; *Smith v. Smith*, 3 Dessaus. (S. C.) 557.

(3) *By a surrender of its franchises*: *Rex v. Osbourne*, 4 East 326; *Rex v. Miller*, 6 Term R. 277; *Howard's Case*, Hutton 87; *Grant Corp*. 306.

(4) *By forfeiture of its charter*: *Rex v. Grosvenor*, 7 Mod. 199; *Smith's Case*, 4 Id. 55; *Rex v. Sanders*, 3 East 199; *Rex v. Kent*, 13 Id. 220; *Attorney-General v. Shrewsbury*, 6 Beav. 220.

We have already seen that a municipal corporation can be abolished by an act of the legislature, and in the United States, where such corporations are organized, as before stated, for the public good, this is the only way in which they can be dissolved. The officers of a corporation are not an integral part thereof, and a failure to

elect them does not work a dissolution : *People v. Town of Fairbury*, 51 Ill. 149 ; *Vincennes University v. Indiana*, 14 How. 268 ; *President v. Thompson*, 20 Ill. 197 ; *Phillips v. Wickham*, 1 Paige Ch. 59 ; and there can be no surrender of the franchise, certainly not without legislative acceptance : 1 Dillon on

Mun. Corp. § 111. And as the failure to elect officers does not of itself work a dissolution, so it cannot be made a ground of forfeiture, as the considerations which would preclude one result would forbid the other : *Welch v. Ste. Genevieve*, 1 Dillon C. C. 130.

H. B. JOHNSON.

Supreme Court of Errors of Connecticut.

ALBERT DAY v. CONNECTICUT GENERAL LIFE INSURANCE CO.

Where an insurance company declared a life policy void (on the ground that the person whose life was insured had become of intemperate habits) and refused to receive any further annual premiums : *Held*, that no present action for the sum insured could be sustained by the policy-holder upon any implied contract to receive the premiums and continue the policy in force during the continuance of the life insured.

The act of the company in refusing to receive the premiums and declaring the policy void, could not affect the plaintiff's rights ; and if without legal excuse, could not prevent a recovery on the policy at the death of the party insured, but was not such a breach of the contract as made the sum insured presently payable.

The principles of *Hochster v. De la Tour*, 2 E. & B. 678, and *Frost v Knight*, Law Rep. 7 Exch. 111, do not apply to such a case.

In such a case the holder of the policy may have his remedy in one of three ways. 1. By treating the refusal as a rescission and suing to recover the present value of the policy ; or 2, by continuing to tender the premiums, and on the ceasing of the life insured, suing for the sum insured ; or 3, by going into equity to have the policy decreed to be still in force.

THIS was an action upon a policy of life insurance by the defendant company upon the life of one Colt, in favor of one West, and assigned to the plaintiff. The declaration averred that the defendants assumed and faithfully promised to perform all the stipulations and agreements in said instrument on their part to be performed, and to keep the said policy in force for the term of the whole continuance of the life of the said Colt, upon the terms and conditions therein set forth. It then averred payment of the annual premiums until October 28th 1872, on which day another payment fell due for the year then next ensuing, and a tender of the amount due that day, and a refusal of the defendants to receive it. It also averred an express declaration by the defendants that they would not longer continue said policy in force, and that the same had ceased and determined, and had become null and void.

The damages were laid at \$10,000, the sum insured, but the

court below charged that the measure of damages was the amount of premiums paid, with interest.

A verdict was rendered for the plaintiff for \$3297, and the defendants filed a motion in arrest for the insufficiency of the declaration. The questions arising on the motion were reserved for the consideration of this court.

C. E. Perkins and J. C. Day, for plaintiff.

H. C. Robinson and C. J. Cole, for defendants.

The opinion of the court was delivered by

CARPENTER, J.—It is not claimed that the alleged promise to keep the policy in force is found in terms in the policy. The only express promise found therein is to pay the policy upon the death of the insured; a contract to pay in the future a certain sum of money. But it is claimed that there is an implied promise to receive the premiums and keep the policy in force, and a breach of this implied promise constitutes the plaintiff's whole cause of action. "Implied contracts," says Blackstone, "are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform." "Implied contracts are those which are raised by operation of law:" 1 Swift's Digest 175. The law raises no contract by implication unnecessarily. Therefore, where substantial justice may be done without it, if the party in whose behalf it is claimed does not need it to protect him in the enjoyment of some legal right, and the party against whom it is claimed does not otherwise obtain some unfair and illegal advantage, no contract will be implied. Let us test this case by an application of these principles.

The plaintiff purchased this policy with knowledge of the nature of the contract; the conditions therein contained, and the obligations thereby imposed. He assumed the liabilities and the risks growing out of the conditions, without any expectation of receiving anything in return until the policy by its terms should become payable.

When it does become payable the defendants must pay it, unless they have a legal defence. If the policy had become null and void, as the defendants claimed, that would be a legal defence. But the jury found against the defendants on that claim, and the question recurs as to the legal effect of refusing to receive the premiums,

and improperly declaring the policy void. These were the defendants' acts alone, not only without the concurrence of the plaintiff, but against his wishes. It certainly requires no argument to show that neither of these acts, nor both combined, would be any defence to the action. The plaintiff then would possess all his legal rights unimpaired, notwithstanding the action of the defendants.

But it may be said that the refusal of the defendants to accept the premium and recognise the continued existence of the policy, raises a doubt as to its validity, and throws a cloud, so to speak, over the plaintiff's property. This may be so; but the claim that a contract has become null and void by reason of the violation of some condition therein contained, is not an invasion of the legal rights of the other contracting party. If the claim is not well founded, the party claiming it will take nothing by it, and the legal rights of the other party will remain unimpaired. This must be true of most contracts; hence there will be no occasion to invoke the aid of the law to imply a contract, in addition to that expressed by the parties. If, however, by reason of the peculiar nature of this contract, and the length of time which may elapse before a suit can be brought on the express promise, there is danger that the party may be prejudiced, perhaps a court of equity, upon a proper petition, might have power to determine the question of forfeiture in advance, and if found not to exist, to declare the policy to be in full force. But however this may be, we think it is quite clear that justice may be done, and the rights of the plaintiff fully protected, without resorting to an implied contract. Nor can it be successfully claimed that the defendants, by their action, obtained any undue or illegal advantage. If they were mistaken in their claims that the policy was forfeited, and if it be true that the policy, notwithstanding such claims, remains in full force, and that the defendants in due time will be liable thereon, the result of the defendants' course will simply be the loss of interest, more or less, on the premiums. The advantages of such a result would be with the plaintiff, and not with the defendants.

Again. The law raises an implied contract, ordinarily, and perhaps always, for the purpose of carrying into effect the presumed intention of the parties. When, therefore, the consequence will be something entirely different from that contemplated by the parties, or if the court cannot clearly see that the probable conse-

quences were intended by the parties, no contract will be implied. Let us apply this test. We will suppose that the defendants really and in good faith claimed that the policy was forfeited by a breach of the conditions. They could not receive the premium without thereby waiving the forfeiture; and if they could, common fairness would require that they should give notice of their intention to claim the forfeiture and decline to take the premium. Now, according to the plaintiff's claim, they could not do this, if unsuccessful, without forfeiting all their advantages in the contract; yea, more: they not only lose all profits, but they have actually carried the risk during all the time the policy was in force. It is in the nature of a penalty for making a legal claim, in good faith, in a court of justice. It cannot be presumed that the parties intended this. Penalties and forfeitures are odious to the law, and when they are necessarily involved in the consequences of an implied contract, no contract will be implied. But if there is no forfeiture in respect to just profits, the rule of damages being, instead of the premiums paid with interest, the plaintiff's proportion of the reserve, even then the contract would seem to be terminated with a loss to the company of all future profits. The law will not presume that that was the intention of the parties. If the contract was not terminated, then a more serious objection to an implied contract arises: a possible liability on both an implied and an express promise; in other words, a liability to refund the premiums or pay the value of the reserve on an implied promise, and ultimately to pay the sum named in the policy on the express promise.

We think, therefore, upon principle that the law raises no such contract as the plaintiff contends for.

We are also of the opinion that the authorities cited in support of the plaintiff's claim are not exactly in point, and do not support the conclusions arrived at. The leading cases are *Hochster v. De la Tour*, 2 E. & B. 678, and *Frost v. Knight*, Law Rep. 7 Exch. 111. The first was an action on a contract to employ the plaintiff as a courier, to commence at a certain day. Before the time arrived the defendant repudiated the contract, and declared he would not perform it. It was held that the plaintiff might treat that as a breach, and sue as for a breach of the contract before the time appointed for it to commence. The ground of the decision will appear from the following, which we copy from the opinion of Lord

CAMPBELL, C. J. : " But it cannot be laid down as a universal rule, that where by agreement an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for the doing of the act has arrived. If a man promises to marry a woman on a certain day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage. If a man contracts to execute a lease on and from a future day for a certain term, and before that day executes a lease to another for the same term, he may be immediately sued for breaking the contract. So, if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them. One reason alleged in support of such an action is that the defendant has before the day rendered it impossible for him to perform the contract at the day ; but this does not necessarily follow, for prior to the day fixed for doing the act the first wife may have died ; a surrender of the lease executed might be obtained, and the defendant might have repurchased the goods so as to be in a situation to sell and deliver them to the plaintiff. Another reason may be that where there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and that they impliedly promised that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation. As an example, a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage. In this very case of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other, and it seems to be a breach of an *implied contract* if either of them renounces the engagement."

Here the words "implied promise" and "implied contract" are used in a very general sense, and not as indicating technically a promise or agreement on which an action can be brought. They seem to be used to indicate, not an independent agreement, but something incident to and forming a part of the express promise, and inseparable from it ; a breach of which was regarded as evidence of, or equivalent to, a breach of the express contract. The action it will be observed was not brought on an implied contract not to "renounce the engagement," but on an express promise to

hire the plaintiff. So, too, of the examples put by way of illustration. Lord CAMPBELL does not say that an action will lie on an implied promise not to lease to another, or not to sell and deliver the goods to another, but on the express promise to lease, or to sell and deliver goods to the plaintiff.

The case of *Frost v. Knight* was an action on a promise to marry on the death of the defendant's father. While the father was yet living the defendant broke off the engagement. It was held that an action would lie immediately. The court says that by the contract of marriage a "new status, that of betrothment, at once arises between the parties. This relation it is true has not by the law of England the same important consequences which attached to it by the canon law and the law of many other countries. Nevertheless it carries with it consequences of the utmost importance to the parties. Each becomes bound to the other; neither can consistently with such a relation enter into a similar engagement with another person; each has an *implied* right to have this relation continued till the contract is finally accomplished by marriage." Here too, it will be observed, there is no intimation that a suit may be brought for a breach of an implied agreement, but substantially the same language is used, and in the same sense, and for the same purposes as that used in *Hochster v. De la Tour*. It will be remembered also that the action was not brought on an implied promise not to marry another person, but on the express promise to marry the plaintiff. In this case it is different. The action is not brought on the express promise which the defendants entered into to pay money, but on an alleged implied promise to receive the premiums and keep the policy in force.

The cases referred to are leading cases on the subject of maintaining actions on promises before the time arrives for their performance. They have been followed by some of the American courts. In *Butis v. Thompson*, 42 N. Y. 246, they were apparently followed, but in *Freer v. Denton*, 61 N. Y. 492, a majority of the court of commissioners hesitated, and it may be regarded as an open question in that state. In *Dugan v. Anderson*, 36 Md. 567, the question was discussed but not decided. In Massachusetts they have been rejected, and the soundness of the principle upon which they rest questioned: *Daniels v. Newton*, 114 Mass. 530. We have now no occasion to say whether in a case exactly in point we should or should not follow them, and purposely leave it an

open question. We would remark, however, that the cases seem to establish the proposition that an action may be brought upon a contract in advance of the time fixed for its performance, where the conduct of the other party has been such as to work a practical destruction of the contract, or to deprive the plaintiff of all benefit to be derived therefrom. The execution of a lease, and the sale of goods to another party, and the marrying another, seem to be cases of this character, notwithstanding the criticism of Lord CAMPBELL. The parties had placed themselves in a position in which it was impracticable for them to fulfil the contract and which rendered it morally certain that they would not and could not perform it. Not so in the present case. Nothing done by the defendants rendered it impossible for them to perform their contract, or in any way interfere with the payment of money when it should become due. The cases referred to were not contracts for the payment of money. One was a contract for hiring, the other was an agreement to marry. When in the one case there was a declaration by one party that he would not hire, and that was accepted by the other as an end of the contract, and in the other case one party married another person, there was in each case a pretty effectual and substantial breach of the contract. The thing agreed to be done could not or would not be done, and nothing was left but for the party in fault to compensate the other in damages. The damages can be ascertained perhaps as well in an action brought before the time for performance as afterwards. Hence, an action on the express contract for a breach has been maintained. In this case the contract is to pay money at a future day. Until that day arrives there can be no breach. The party promising may cease to exist or become bankrupt before the day, so that it will be morally certain that the contract will not be performed; but that is no breach, and will not justify the bringing of an action on the contract.

No act of the promisor in a case like this without the consent of the promisee, will rescind or terminate the contract, and no act of his before the time will amount to a breach. The declaration that he will not pay or cannot pay does not relieve him of his obligation. That still remains in force, and when the time arrives, if of sufficient pecuniary ability, he may be compelled to perform specifically, that is, to pay the money. The reason that he gives that he will not pay, that the promisee has done some act or omitted to

do something whereby the contract is forfeited, does not strengthen the claim. The reason may or may not be true. If it is true, that of itself ends the contract, and no action can be maintained at any time. If it is not true, the claim amounts to nothing. It is no invasion of the legal rights of the other party, as the contract still remains in force. The claim of the plaintiff therefore is really this: If an insurance company makes a claim that the policy is forfeited by a breach of some condition contained therein, and the claim is not maintained, the policy is thereby converted into a contract to pay money at an earlier day, or some obligation to pay money arises by implication of law, *dehors* the express contract, and in some measure independent of it, which may be enforced immediately. Neither position is tenable, and neither can be maintained upon principle or by authority.

This case is also to be distinguished from a class of cases where both parties concur in treating a contract as rescinded, or, what is the same thing, where one party repudiates the contract and declares that he will not perform it, and the other thereupon elects to treat the contract as at an end, and brings an action as for a breach. In such cases actions may be maintained either on the express contract or an implied contract. Where one party has paid money or performed services for which he has not received a fair equivalent, the law will, if need be, imply a contract to refund or pay what is equitably due in order to prevent injustice, and this principle has been applied to insurance cases.

In *McKee v. Phoenix Life Ins. Co.*, 28 Mo. 383, it was held that "if the defendant company wrongfully determined the contract by refusing to receive a premium when due, then the plaintiff had a right to treat the policy as at an end, and to recover all the money she had paid under it."

In *Howland v. The Continental Life Insurance Co.*, 121 Mass. 499, the premium fell due on Sunday, and payment was tendered on Monday and refused. A suit was brought eleven months afterwards, with no previous notice to the company that the plaintiff elected to abandon the policy. The court held, that the suit could not be maintained, on the ground that the election was not within a reasonable time.

In *McAllister v. New England Mutual Life Insurance Co.*, 101 Mass. 558, the insured refused to pay a premium note, and declared "he would not have anything more to do with the insurers,

and abandoned the whole thing;" but he retained the policy and the insurers retained the note; nor did it appear that they consented to the abandonment. It was held that the policy remained in force.

These authorities show, and that alone is the purpose for which we cite them, that in order to terminate the policy in such cases, the concurrence of both parties is necessary.

In *Haynes v. The American Popular Life Ins. Co.*, 69 N. Y. 435, the company refused to receive the premiums, claiming that the policy had lapsed. The plaintiff brought an action against the company to have the policy adjudged in force and obtained judgment. The judgment was affirmed by the Court of Appeals. In *Cohen v. New York Mutual Life Insurance Co.*, 50 N. Y. 610, it was held that the court might exercise equity powers and declare the legal status of the parties.

Thus it would seem that a person situated as the plaintiff was may choose between two remedies. 1. He may elect to consider the policy at an end; in which case, with a declaration containing proper averments, he may recover the equitable and just value of the policy. He ought not to recover more, as the policy was terminated by mutual consent, and it does not seem to be a case where either party ought to be subjected to penal consequences. Of course such a case should depend upon the question, whether the policy was rightfully declared forfeited. If it was, the plaintiff cannot recover; if it was not, he will recover the full value of the policy. 2. If he desires that the policy shall continue, he may institute a proceeding to have the policy adjudged to be in force, in which case the question of forfeiture may be determined. In that case the rights of the parties will be determined in a reasonable time, the parties will be relieved of suspense and if it is decided against the forfeiture, both parties will have what they originally contracted for.

Perhaps, a third course is open to him; and that is, to tender the premium, and if refused, wait until the policy by its terms becomes payable, and then test the forfeiture in a proper action on the policy. This course may involve delay for a long series of years, during which both parties will be in uncertainty as to their legal rights, and it will be attended with this further disadvantage, both parties may find it difficult to obtain proper proof.

The plaintiff in this case pursued an entirely different course.

He did not wait for the policy to become a claim, he did not resort to a court of equity to have the policy established, and he did not elect to consider the policy at an end. But he brought a suit on an alleged implied promise, and seeks to recover the full amount of the premiums paid, with interest, leaving the question of the defendants' liability on the express promise contained in the policy, an open one. This we think cannot be done.

The plaintiff's declaration is insufficient and the superior court is advised to arrest the judgment.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF IOWA.²

SUPREME JUDICIAL COURT OF MAINE.³

SUPREME COURT OF MISSOURI.⁴

SUPREME COURT COMMISSION OF OHIO.⁵

AGENT See *Officer ; Railroad*.

Note in Agent's Name as Treasurer, &c.—A promissory note of this form: "One year after date we promise to pay to the order of A. B., one thousand dollars, value received," and signed, "George Moore, Treasurer of Mechanic Falls Dairying Association," is the note of Moore, and not of the association; and it makes no difference that the plural "we" is used instead of "I." *Mullen v. Moore*, 68 Me.

AUCTIONEER. See *Constitutional Law*.

BILLS AND NOTES. See *Agent ; Collateral Security*.

Endorser's Liability.—Evidence will not be received for the purpose of showing that a payee of a promissory note, who has transferred it by an endorsement in blank, verbally agreed, at the time of making the endorsement, to assume an absolute and unconditional liability, and not the liability simply of an endorser: *Rodney v. Wilson*, 67 Mo.

CHATTEL MORTGAGE. See *Mortgage*.

COLLATERAL SECURITY.

Demand and Notice as against an Endorser holding security for his indemnity.—Demand and notice is not necessary as against an endorser,

¹ Prepared expressly for the American Law Register, from original opinions filed during October Term 1878. The cases will probably be reported in 7 or 8 Otto.

² From J. S. Runnells, Esq., Reporter; to appear in 47 Iowa Reports.

³ From J. D. Pulsifer, Esq., Reporter; to appear in 68 Maine Reports.

⁴ From T. K. Skinker, Esq., Reporter; to appear in 67 Missouri Reports.

⁵ From E. L. DeWitt, Esq., Reporter; to appear in 32 Ohio St. Reports.

who, at the date of the maturity of the note, has sufficient property of the maker in his possession held as security against his liability. *Beard v. Westerman*, 32 Ohio St.

A party holding one of a series of notes secured by chattel mortgage, who obtains possession of the property mortgaged, holds it in trust for the owners of the notes; and if he purchase such property at a sale made by himself, he will be held to account for the fair value of the same: *Id.*

CONSTITUTIONAL LAW.

Auctioneer's Sales, Tax on—Regulation of Commerce.—A tax laid by a state on the amount of sales made by an auctioneer is a tax on the goods sold: *Cook v. Pennsylvania*, S. C. U. S., Oct. Term 1878.

Where the goods sold for which he is required to collect and pay a tax are imported goods in the original package, sold for the importer, the law which authorizes the tax is void as laying a duty on imports and as a regulation of commerce: *Id.*

CONTRACT. See *Name*.

CORPORATION. See *Agent*.

Contracts ultra vires.—Corporations possess such powers, and such only as the law of their creation confers upon them; and when created by public acts of the legislature, parties dealing with them are chargeable with notice of their powers, and the limitations upon them, and cannot plead ignorance in avoidance of the defence of *ultra vires*: *Franklin Company v. Lewiston Institution for Savings*, 68 Me.

The trustees of the Lewiston Institution for Savings subscribed for \$50,000 of the capital stock of the Continental Mills, and having no money to pay for it, the Franklin Company, another corporation, paid that amount at the Continental Mills, taking the notes of the savings institution therefor, and a certificate of the stock in their own name as collateral security for the payment of the notes. *Held*, that the action of the trustees of the savings institution was *ultra vires*; that it is not within the authority of savings institutions, at a time when they have no funds for investment, to purchase stocks or other property not needed in immediate use, on credit, and thus create a debt binding on the institution; that the Franklin Company, having participated in the illegal transaction, could not claim the privileges of a bona fide holder of commercial paper; and that the savings institution, having received no benefit from the transaction, was not estopped to set up the defence of *ultra vires*: *Id.*

Semble, upon the authorities cited, that in the United States corporations cannot purchase, or hold, or deal in the stocks of other corporations, unless expressly authorized to do so by law: *Id.*

CRIMINAL LAW.

Revision and Alteration of Sentence.—Where a court in passing sentence for a misdemeanor, has acted under a misapprehension of the facts necessary and proper to be known in fixing the amount of the penalty, it may, in the exercise of judicial discretion and in furtherance of justice, at the same term, and before the original sentence has gone into operation. Vol. XXVII.—8

tion, or any action has been had upon it, revise and increase or diminish such sentence within the limits authorized by law. *Lee v. The State*, 32 Ohio St.

In the absence of anything on the record showing what the facts were, the reviewing court will presume that the court below acted upon sufficient and valid information : *Id.*

DEBTOR AND CREDITOR. See *Frauds, Statute of.*

DEED.

Weakness of Grantor's Intellect.—A deed will not be set aside because of the weakness of the grantor's intellect, unless undue advantage has been taken of such weakness in procuring its execution : *Marmon v. Marmon*, 47 Iowa.

EASEMENT.

Non-user—Abandonment—The non-user of an easement for twenty years is evidence of intention to abandon ; but it is open to explanation, and may be controlled by proof that the owner had no such intention while omitting to use it : *Pratt v. Sweetser*, 68 Me.

EQUITY.

Reformation of Policy of Insurance.—K. took out a policy of insurance on certain cotton, on account of the firm of which he was a member, but the policy did not state in terms that the insurance was for and on account of said firm. K., however, was assured by the agents for the insurance company, that this was not necessary. Relying upon these assurances, and ignorant that, by the terms and legal effect of the terms employed, no other interest in the cotton was insured except his, K. took the policy into his possession in the full belief that it covered the entire interest of the firm ; soon thereafter, however, upon being advised to the contrary by his attorney, he demanded of the insurance agents that the policy be corrected so as to conform to the real contract and agreement, but they refused to correct or alter the same in any way. *Held*, that a court of equity has jurisdiction in such a case to reform the policy : *Snell et al. v. Atlantic F. & M. Insurance Co.*, S. C. U. S., Oct. Term 1878.

ESTOPPEL. See *Husband and Wife.*

EVIDENCE. See *Bills and Notes* ; *Frauds, Statute of* ; *Officer* ; *Railroad* ; *Trial.*

Opinion of Witness—Intoxication.—A witness may state whether or not in his opinion a person is intoxicated, and is not confined to a statement of the conduct and demeanor of the party inquired about : *The State v. Huxford*, 47 Iowa.

Upon the trial of a person indicted for being found in a state of intoxication, evidence respecting the conduct of defendant at other times when intoxicated is admissible, for the purpose of showing the character of the acts relied upon as evidence in the case : *Id.*

FIXTURES.

Manure on Farm.—Manure, accumulated in the course of husbandry from the occupation of a farm belonging to a wife, as between her and

her husband, is a part of the land belonging to her, although his stock and his hay, brought upon the place while occupied by them, in part produced the accumulation : *Norton v. Craig*, 68 Me.

FRAUDS, STATUTE OF.

Paying Debt of Another—Evidence.—A. being a creditor of B. and also debtor to C. in an equal amount, it was verbally agreed by way of settlement among them, that B. should pay C. what he owed A. *Held*, that the agreement was not within the Statute of Frauds, and was binding : *Wright v. McCully*, 67 Mo.

An order having been drawn by A. upon B. in favor of C., to carry out such an agreement : *Held*, admissible in evidence to show the exact amount B. has assumed to pay : *Id.*

HIGHWAY.

Town—Width of Highway—Combined effect of Defect and other cause.—A town is not required to render its roads passable for travelling for the entire width of their located limits, but only to keep a width thereof in a smooth condition, sufficient to render the passing over them safe and convenient : *Perkins v. Inhabitants of Fayette*, 68 Me.

A town has the right, in making or repairing a road, to remove stones and stumps on to, and leave natural obstructions upon, the sides of a way ; provided the same are situated so far from the travelled track that persons with teams may pass without danger of coming in collision with them : *Id.*

A town is not liable for damage sustained by a traveller from the fright of his horse at meeting cows in the road with boards on their horns, and also from a defect in the way, the combined action of both causes operating to produce the accident : *Moulton v. Sanford*, 51 Me. 127, reaffirmed : *Id.*

HOMESTEAD. See *Husband and Wife*.

HUSBAND AND WIFE. See *Fixtures*.

Rights and Liabilities of Wife—Homestead.—By the laws of Iowa the wife has similar property rights and is chargeable with similar obligations with the husband under like circumstances, and coverture is no defence against the enforcement of the rights of others growing out of her contracts : *Spafford v. Warren*, 47 Iowa.

The wife may ratify a defective and void conveyance of her homestead, in all cases where her husband could ratify such an act : *Id.*

A void deed of a homestead, in all cases where a similar deed of other property could be ratified, may be ratified by the assent or contract of the parties, expressed or presumed from their acts : *Id.*

Where a conveyance of the homestead by the wife was void, but she surrendered possession of the property voluntarily, made no objection to the grantee's title when in her presence he offered to sell it, and permitted him to remain in quiet possession for more than three years and make improvements without protest, *held*, that her conduct amounted to a ratification of the deed ; *Id.*

Necessaries—Liability of Husband for, when Wife living separate.—Where a wife is living separate and apart from her husband, and, in a suit against him for divorce and alimony, has obtained a decree fixing

the amount of alimony to be paid by the husband for her sustenance during the pendency of her petition, and the husband is not in default in respect to the payment of the alimony so allotted, he is not liable for necessities subsequently furnished at her request during the pendency of her petition: *Hare v. Gibson*, 32 Ohio St.

Persons dealing with the wife, under these circumstances, do so at their own peril, and are chargeable with knowledge of the allotment and payment of the alimony: *Id.*

The adequacy of the alimony decreed in such case, can not be collaterally drawn in question, especially by a stranger to the suit: *Id.*

INSURANCE. See *Equity*.

Marine Insurance—Particular Average—Partial Loss.—The memorandum clause in an open policy of insurance, on three barge loads of wheat, described the risk as 39,085 bushels bulk wheat, at \$1.15 per bushel—sum \$449.45; rate 1; premium \$449.45; to be conveyed from Lansing to St. Louis by steamer and barges. In an action upon the policy, it was held that the wheat was insured in bulk, and not in packages, either of one bushel or one barge each; that a clause in the policy, "Each package shall be subject to its own average," did not apply to such a risk; and that, in determining the percentage of partial loss, the proportion between the entire actual loss and the value of the entire shipment must be ascertained: *Haenschen v. Franklin Ins. Co.*, 67 Mo.

INTEREST.

Special Rate—Note payable on demand.—On a note payable on demand, with interest at ten per cent., that rate of interest is recoverable up to the date of the verdict, when damages are assessed by a jury, and up to the date of judgment, when a default is entered in a suit on the note: *Paine v. Caswell*, 68 Me.

INTOXICATION. See *Evidence*.

LANDLORD AND TENANT. See *Mortgage*.

LUNATIC. See *Deed*.

MASTER AND SERVANT. See *Railroad*.

MORTGAGE. See *Collateral Security; Possession*.

Rule of State Courts or Statute as to Order in which Real Estate shall be subjected to Satisfaction of Mortgage, followed by Federal Courts.—Right of Redemption.—The order in which real estate which has been mortgaged, and subsequently sold at different times to different purchasers, shall be subjected to satisfaction of the mortgage is, where the rule is established by state statute or the decisions of state courts, a rule of property which will be followed by the federal courts sitting in such state: *Orvis v. Powell*, S. C. U. S. Oct. Term 1878.

The right of redemption, after sale on foreclosure, in Illinois, as decided in *Brine v. Insurance Co.*, 6 Otto, re-affirmed: *Id.*

When not recorded—Landlord's Lien.—An unrecorded chattel mortgage is not valid as against a mortgage subsequently executed and entered of record: *Pitkin v. Fletcher*, 47 Iowa.

By taking a mortgage which, from a failure to record it, cannot be enforced, a landlord does not lose his landlord's lien upon the property of his tenant: *Id.*

MUNICIPAL BONDS.

Recital on their Face of Election to authorize their Issue—Innocent Holder.—Where municipal bonds, upon their face, refer to the ordinance of the city council authorizing their issue, printed on the back, and in the ordinance it is distinctly recited that the election required by law was held, pursuant to notice, given in accordance with the provisions of the act authorizing a subscription, and that upon a canvass of the votes "it appeared that there had been cast for subscription a large majority of the votes of said city, the number of votes given being a large majority of all the votes polled at the last general election in said city, and a much larger vote than that required by the act aforesaid to authorize said subscription," and the said bonds are in the hands of an innocent holder. *Held*, that it is not error in the court below to sustain a demurrer to pleas which simply tender an issue as to the authority of the city to issue the bonds, and as to the fact of an election in the manner provided by law: *City of Nuwvo v. Ritter*, S. C. U. S., Oct. Term 1878.

NAME.

Signature Binding, though not in usual Name.—A contract is binding when signed by the party making it, though he may use an English translation of a French name, as Seam for Couture, in his signature thereto: *Augur v. Couture*, 68 Me.

NEGLIGENCE.

Railroad Crossing—Negligence as Matter of Law.—Ordinary prudence requires that a person in the full enjoyment of the faculties of hearing and seeing, before attempting to pass over a known railroad crossing, should use them for the purpose of discovering and avoiding danger from an approaching train; and the omission to do so, without a reasonable excuse therefor, is negligence, and will defeat an action by such person for an injury to which such negligence contributed: *Pennsylvania Co., &c. v. Rathgeb*, 32 Ohio St.

In an action for damages for alleged negligence, the question of negligence on the part of the defendant, or of contributory negligence on the part of the plaintiff, is generally a mixed question of law and fact, to be decided by the jury, under proper instructions from the court: *Id.*

But if all the material facts touching the alleged negligence be undisputed, or be found by the jury, and admit of no rational inference but that of negligence, in such case the question of negligence becomes a matter of law merely, and the court should so charge the jury: *Id.*

The court, in charging the jury, observed: "I will not say to you that the plaintiff should have looked east along the track. I will only say that he was obliged to use his sense of sight in a reasonable manner; and it is for you to say whether he ought to have looked to the east along the track or not, before he attempted to cross." If it appear that by looking he could have run and avoided the danger, it was his duty to look; and in such case the court should have charged, as matter of law, that it was his duty to look: *Id.*

NUISANCE.

Increase of Population—Effect on Trades in certain Localities—Abatement of Nuisance.—Every right, from absolute ownership in property down to a mere easement, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others. Though at the time it be remote and inoffensive, the purchaser is bound to know at his peril that it may become otherwise by the residence of many people in its vicinity and that it must yield to by-laws and other regular remedies for the suppression of nuisances: *Northwestern Fertilizing Co. v. Village of Hyde Park*, S. C. U. S. Oct. Term 1878.

In such cases prescription, whatever the length of time, has no application. Every day's continuance is a new offence and it is no justification that the party complaining came voluntarily within its reach. Pure air and the comfortable enjoyment of property are as much rights belonging to it as the right of possession and occupancy. If population, where there was none before, approaches a nuisance, it is the duty of those liable at once to put an end to it: *Id.*

OFFICERS. See *Railroad.*

Public Officers—Judicial notice will be taken of the powers and authority of public officers when they are prescribed by law. They need not be pleaded: *State ex rel. Clark v. Gates*, 67 Mo.

Where an agent is clothed with general powers, the means and measures necessary to carry them into effect are also granted: and this principle is applicable to public as well as private agents: *Id.*

The state treasurer may pay a demand upon the treasury by a check upon a bank where he has money on deposit, that mode of payment being in accordance with immemorial commercial usage: *Id.*

When a county treasurer receives from the state treasurer a bank check for money due from the state to the county, it is his duty to make presentment for payment within a reasonable time, and if he neglects to do this, and before the check is paid the bank fails, the loss will fall upon himself: *Id.*

PARTNERSHIP.

What does not Constitute.—The occupancy and cultivation by one of the farm of another, under an agreement that the crops raised shall be divided between them in a certain proportion, does not constitute them co-partners: *Donnell v. Harshe*, 67 Mo.

POSSESSION.

Adverse—Extent of when Part of Tract only is occupied—Mortgage.—One who enters upon land under color of title, intending to take possession of the entire tract, no part of which is held adversely at the time of his entry, is deemed to be in possession to the extent of his claim: *Clark v. Potter*, 32 Ohio St.

Prior to the code of civil procedure, equity followed the law in determining when time would begin to run against the right of a mortgagor to redeem and when such right would be barred: *Id.*

Hence, if the mortgagee, with the knowledge and acquiescence of the mortgagor, takes actual, open and notorious possession of the mortgage premises and holds and controls the same adversely to the rights of

the mortgagor to redeem for twenty-one years, under color of title derived from the mortgage and from a decree of foreclosure and sale of the same to him, the equity of redemption is barred, although the decree foreclosing the mortgage was null and void: *Id.*

Where the mortgaged premises is an entire tract, as a farm, part of which only is improved, with a tenement thereon, and the possession to the whole is so far adverse as to create a cause of action in favor of the mortgagor, and cause time to commence running against the right to redeem; the temporary interruption of *actual residence* on the land, caused by the unlawful and violent acts of strangers in tearing down the house and rendering the premises untenable for the time being, will not prevent the statute from continuing to run where there is no adverse entry or offer to redeem, and the mortgagee does not abandon his possession and control, but continues to exercise all such acts of ownership and dominion over the premises as the nature of the land and its condition will admit of: *Id.*

RAILROAD. See *Negligence*.

Agency—Officer—Evidence.—No recovery can be had against a railroad company for drugs furnished to a person who has been hurt by the company's locomotive, on the order of a division superintendent of the road, without proof that he was authorized to give the order. The courts cannot take judicial notice of the duties of such an officer: *Brown v. Missouri, Kansas & Texas Railway Co.*, 67 Mo.

Liability of Company for tortious entry of its Contractor on Lands of another.—A railroad company, by whose direction a contractor for the construction of its road enters and builds the road upon land which it has acquired, subject to an existing lease, is liable as a joint tortfeasor with the contractor and his servants, for damages done by them, in the prosecution of the work to the crops of the lessee: *Ullman v. Hannibal & St. Joseph Railroad Co.*, 67 Mo.

SHIPPING.

Stipulation of Seaworthiness—Implied Contract—Liability of Owner.—Where the owner of a vessel charts her, or offers her for freight, he is bound to see that she is seaworthy, and suitable for the service in which she is to be employed. If there be defects known, or not known, he is not excused. He is obliged to keep her in proper repair, unless prevented by perils of the sea or unavoidable accident. Such is the implied contract where the contrary does not appear: *Work v. Leuthers*, S. C. U. S. Oct. Term 1878.

The owner is liable for the breach of his contract, but the stipulation of seaworthiness is not so far a condition precedent that the hirer is not liable in such case for any of the charter-money. If he uses her he must pay for the use to the extent to which it goes: *Id.*

STATUTE.

Special License followed by General Statute.—Where the legislature by special act grants to A. the privilege or license to do a certain act, as to erect a weir in certain tide waters, and afterwards by a general act gives all others the same right under certain conditions precedent: *Held*, that the general act does not operate as a repeal or modification of the special act: *State v. Cleland*, 68 Me.

SURETY.

On Official Bond—Imposition of new Duties on Officer not a discharge of Surety.—The addition of duties to the office of collector of customs different in their nature from those which belonged to the office when the official bond was given will not impose upon an obligor in the bond, as such, additional responsibilities, and such an addition of new duties does not render void the bond of the officer as a security for the performance of the duties at first assumed. The surety, in such bond, will, therefore, not be discharged : *Gaussen, Executrix of Elgee, v. United States, S. C. U. S., Oct. Term 1878.*

Requiring a person, who is a collector of customs, to receive a sum of money and apply it in discharge of some liability of the government outside of his ordinary employment, for example, to pay debentures, to disburse money for the construction of a new marine hospital, or for the maintenance and supply of existing hospitals and lighthouses, may impose a new duty upon him, but it leaves his office, as collector, untouched and his accountability in it unimpaired : *Id.*

Bond—Alternative Condition.—Where the condition of a bond for duties is that, within one year, the importer shall pay to the collector \$425, or the amount of the duties which should be ascertained to be due; or should, within three years, withdraw and export them, or transport them to a Pacific port, the condition is in the alternative, and the word "or" cannot be construed "and :—" *Dumont v. United States, S. C. U. S., Oct. Term 1878.*

TAXATION. See *Constitutional Law.*

TRIAL.

Admissions for purposes of—How far binding.—An admission made at the first trial, if reduced to writing, or incorporated into a record of the case, will be binding at another trial of the case, unless the presiding justice, in the exercise of his discretion, thinks proper to relieve the party from it : *Holly v. Young, 68 Me.*

TRUST AND TRUSTEE. See *Collateral Security.*

Holder of Money for Indemnity is Trustee—Liable for Interest if he uses the Money.—Where the grantee of land holds the purchase-money in his hands after it becomes due by agreement with the grantor, to indemnify himself from loss by reason of an encumbrance on the land, and enjoyment of the rents and profits thereof until the encumbrance is removed, he holds the amount due to the grantor as his trustee, and if he uses the money for his own benefit, he is chargeable with interest on the money from the time it becomes due until paid : *McCrea v. Martien, 32 Ohio St.*

UNITED STATES COURTS. See *Mortgage.*

USURY.

Extension of Time of Loan—Surety.—The extension of time of payment of a loan is a loan of money within the meaning of a statute, and where the sureties upon a note executed a new note for the consideration of the extension of time upon the original undertaking, the transaction was held to be usurious : *Kendig v. Linn, 47 Iowa.*

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INVIOABILITY OF TELEGRAPHIC CORRESPONDENCE.

PERHAPS nothing in recent legal history is more remarkable than the general acquiescence of the public in the asserted right to bring into court and before legislative bodies, as instruments of evidence, the private messages sent by telegraph. It is remarkable not only because legal analogies and precedents seem to be against the right, but also because the power to make this use of telegrams is liable to enormous abuses, and seems to be opposed to one of the first and most vital principles of liberty.

Telegraphy is a new business in the world. When it first began it became manifest at once that a very considerable proportion of the correspondence of the world must be done by it, and the question arose how it should be dealt with by the law. Governments then controlled the carriage of correspondence, and the telegraph assumed the position, to some extent at least, of a rival of the government. It would perhaps have been competent for our own government at that time to do what the government of Great Britain has since done—take charge of telegraphy as a part of the postal service, and wholly exclude competition. The government did not see fit to do this. On the contrary it welcomed the telegraph as an important and useful auxiliary, and the states proceeded to pass laws for its regulation, and to lend aid in its extension. It may justly be said then that public policy favored and encouraged the telegraph.

For the most part telegraph companies were left to make rules and regulations to govern their own business, and they have established many rules which have passed under judicial supervision, but with which we are not concerned now. One rule, which has probably come into existence by usage rather than by legislation, is that under which the original of any message sent and a copy of the reply are left in possession of the telegraph company. The chief and possibly the only purpose of this is that the telegraph company may have in its own hands the means of protection, in case it is charged with mistakes in transmitting messages, or with sending forged or fraudulent despatches. The most important regulation which has been established by statute is that inviolable secrecy shall be preserved in respect to messages by those through whose hands they shall pass; severe penalties being imposed upon operators who violate this injunction. Government has thus done all that was in its power to give to parties conducting correspondence by telegraph the advantages they would have in conducting private correspondence by the mail, while they also have the additional advantage of expedition.

There are thus to every telegraphic despatch three parties—the sender, the receiver and the telegraph company. No doubt each of these has a certain control in respect to the message. For their own purposes the sender and receiver may make use of it as they would or might of any private letter which had passed between them. The telegraph company must preserve inviolable secrecy in respect to it, but if the company were to be sued for error or negligence in transmitting it, the message would thereby be brought before the court, and the company might make use of it for its own protection. The privilege of secrecy is the privilege of the parties, and would necessarily be waived by either if he were to complain of the company's action in respect to it. It is customary to provide by statute that the operator shall transmit all messages in the order in which they are received; and it has been held that he has no authority to refuse to transmit any message, even though it be sent to favor an immoral purpose, (*Western Union Telegraph Co. v. Ferguson*, 57 Ind. 495), any more than a postmaster has to detain a letter for a similar reason. Of course it is competent to provide by law—as is sometimes done—that such telegrams may be refused.

The question to which attention is now directed is whether the

telegrams, thus left in custody of telegraph companies, may, by any process of law, be brought into court without the consent of either of the parties, in order that they may be used as evidence in suits or prosecutions instituted by others. In discussing this question it will be assumed that there is no express prohibition of law, and that if prohibited at all it is by the penalty which is imposed for voluntary disclosures, or by those maxims of the common law by which individual liberty is guarded and protected. The question is therefore one of constitutional law; a question, too, not dependent so much upon the words of any express provision of the Constitution as upon the previous history in the light of which constitutions must be interpreted.

As popular and legislative power increases in this country, less attention is paid to the English precedents by the aid of which constitutional liberty has been established. We come, perhaps habitually, to look upon these as having been useful in setting bounds to the authority of the crown; forgetting that upon them may still depend the liberty of the citizen. Constitutional discussions take a direction somewhat different from that in former days: they involve technicalities more; the construction of words and phrases, and the extent of prohibitions, while the general principles which are the animating spirit of constitutional law, and without which the organic forms may support despotism as readily as liberty, are passed by with little notice. Such a course would be proper enough if those principles had become so firmly settled and fixed in the minds and consciences of all classes of officials as to be habitually recognised and observed; but no thoughtful and observant person will venture to affirm that he believes this to be the case. On the contrary, a sentiment prevails which favors the exercise of doubtful powers. The popular impression, though it may not often find voice, is that, when the monarchical principle was eliminated from the Constitution, dangers to personal liberty were in great measure precluded; and one who often appeals to ante-revolutionary precedents, against oppressive official action, is likely to be charged with excessive conservatism, and perhaps with pedantry. Under the influence of this impression popular majorities have freely exercised questionable powers, legislation has been too little regardful of private rights, and executive authorities, when the popular feeling has accompanied their action, have often exercised, with little criticism, authority that would not be acquiesced

in without protest in Great Britain. The decision in *Milligan's Case*, 4 Wall. 2, did very much to check a tendency in this direction, but did not by any means overcome it. And this must be our apology for calling attention briefly to precedents which we may suppose are familiar, but the full import of which is not so generally acknowledged as it should be.

Our constitutional provisions for the protection of private papers may unquestionably find their best explanation in *Wilkes's Case*, and in the legal proceedings which grew out of it. It will be remembered that, enraged by the attacks of the "North Briton" upon the prerogative, Lord Halifax, Secretary of State, issued a general warrant, which commanded the messengers, taking with them a constable, to search for the authors, printers and publishers, and to apprehend and seize them, together with their papers. It was under the pretended authority of this warrant that the premises of Wilkes were invaded, his desks broken open, and his papers carried off. All the cases which grew out of this transaction turned upon the validity of the warrant, as a protection to the parties executing it; but the court, in disposing of them, did not overlook the seizure of private papers, and in the name of the law condemned it unsparingly. "Papers," said Lord CAMDEN, "are the owner's goods and chattels: they are his dearest property, and are so far from enduring a seizure that they will hardly bear an inspection; and, though the eye cannot by the laws of England be guilty of a trespass, yet, where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives a magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society." *Entinck v. Carrington*, 19 State Trials 1030, 1065; s. c. 2 Wils. 275; s. c. Broom Const. L. 558; *Wilkes v. Wood*, 19 State Trials 1154; s. c. Lofft's Reports 1; s. c. Broom Const. L. 548. The case, as will be seen, did not by any means turn wholly upon the breaking into the tenement and the forcing of locks, but it brought to the front as a principal grievance the injury the subject might sustain by the exposure of his private papers to the scrutiny and misconception of strangers.

The writs of assistance in the colonies, against which Otis, Adams

and Gridley spoke so ably and so boldly, were obnoxious on the same grounds as the general warrants of Lord Halifax, and were susceptible of the same abuses.¹

These were fresh in the public mind when the convention which framed the Federal Constitution was in session, and it was one of the complaints commonly made against that body that it did not declare the fundamental right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. The fourth article of the amendments to the Constitution supplied the defect. No one ever doubted, so far as we are aware, that the purpose of this amendment was to embody in the fundamental law of the land the principles laid down by Lord CAMDEN in the *Wilkes Case*, and upon which the opponents of the writs of assistance in this country had planted themselves.

The question now made is, whether telegrams in possession of the telegraph authorities are the private papers of those who have sent and received them. We concede that for their own protection telegraph companies may retain them, and that they have a qualified property in them for that purpose. It is also provided by statute in some states that messages sent by telegraph shall be retained for a certain time, in order that, if necessary, they may be used as evidence; and such a statute may raise an implication that they are subject to be used in evidence generally; though its terms would be fully answered by restricting the use to the parties directly concerned, namely, the sender, the receiver and the telegraph company. But except for the benefit and protection of the parties concerned, it would seem that the ground on which Lord CAMDEN denounced the seizure of private papers would be strictly applicable here, namely, that their exposure to the idle or malicious curiosity of others "would be subversive of all the comforts of society."

The proper view to take of this subject seems to be to consider it in the light of the rules which govern private correspondence by mail. The secrecy of private correspondence by mail has been protected from the earliest days, and every invasion of it has been punishable. In Great Britain an exception is theoretically made of the case of suspected treasonable correspondence, in which a secretary of state is allowed to issue his warrant for opening and

¹ The best account of these writs is found in the Appendix to Quincy's *Massachusetts Reports*, where some current misconceptions are corrected.

inspecting particular letters;¹ but even this is not permitted in this country, and the officer who opens letters to obtain evidences of criminal conduct is himself guilty of a crime. In a few cases the postmaster is permitted to open packages to ascertain whether the privilege of the mails is being abused; as where he suspects papers are being sent as a medium of correspondence, or obscene publications are being transmitted, and the like; but these cases are few and exceptional, and every person who sends such packages through the mails understands what rights the government reserves when accepting them. In respect to correspondence proper the secrecy of the mails may be said to admit of no exception.

Nor does government protect correspondence on its own account, because of any interest it can have in encouraging intercourse by mail. It is true that government demands a compensation for conveying letters, as an express company or any other common carrier might do, but it does not transport the mails as a business, with a view to a remunerative profit expected therefrom. The government seeks no profits, and it arranges its tariff of charges on a consideration of what is most for the public good, rather than from regard to cost. Its principles of action are therefore governmental, not private; and its carrying the mail at all is to be justified on the ground that private enterprises could not be expected to accommodate so completely and so uniformly all sections of the country, but would govern their action by their own interest rather than by considerations of a broad and liberal public policy. It may be safely affirmed, therefore, that government does not protect the secrecy of correspondence in order that it may obtain more business, but because the secrecy tends to the promotion of public and family confidence, and encourages a most valuable feeling of security in free intercommunication between all classes of community. The reasons for protection, in other words, are precisely the same while private letters are passing through the mails as they are after the letters have been deposited in private desks or safes. No doubt correspondence by express would be protected in like manner if it were deemed politic or wise to encourage that method of communication as a rival to transportation by the government.

¹ Perhaps it may safely be assumed that this right, like the right to veto legislation, has become obsolete; the last instance in which it was exercised having been in 1844.

If the new means of correspondence by telegraph were such as countervailed some principle of public policy, or some governmental interest, and if it were purely a matter of choice with the citizen whether he would avail himself of it or not, those who used the telegraph might properly enough be left to take all the risks of their confidence being abused, or to provide against it as best they might. But it is certain that it countervails no public policy. This is fully settled by the statutes which encourage the construction of telegraph lines, permitting private lands to be appropriated for the purpose against the will of the owners, and by those which encourage the use of the telegraph by providing rules for impartiality and secrecy. Neither is the use of the telegraph a matter of mere choice. Business transactions cannot be successfully carried on without resort to its facilities, and the exigencies of family communication are daily demanding the most speedy transmission of messages that shall be found possible. Indeed the government itself is affected by the same compulsion, and not a day or an hour passes that some government official is not making use of the wires to accomplish purposes for which the post office service would be altogether too tardy. Foreign intercourse is conducted by the assistance of the telegraph; the army is moved; vessels of the navy despatched from port to port; officers guided in their duties; important consultations had between distant points; offenders arrested and payments made; all by means of the facilities it affords. In a great variety of cases, therefore, and those too of the highest importance, the use of this means of correspondence is not only urgent, but absolutely imperative.

And yet it is said that this immense and important correspondence, which concerns every possible relation of public and private life, is subject to the *subpœna duces tecum* of any court that may see fit to call for it, and must be produced on the demand of any party who believes or suspects it contains evidence important to his interest, or who chooses to cast a drag net over it in order to ascertain whether he may not use it to his advantage.

The reasons assigned for subjecting it to the process of the courts are that otherwise "the telegraph may be used, with the most absolute security, for purposes destructive to the well being of society; a state of things rendering its absolute usefulness at least questionable. The correspondence of the traitor, the murderer, the robber and the swindler, by means of which their crimes and

frauds could be the more readily be accomplished, and their detection and punishment avoided, would become things so sacred that they could never be accessible to the public justice, however deep might be the public interest involved in their production." (Judge KING in *Henisler v. Friedman*, 2 Pars. Sel. Cas. 274.) This is perfectly true, and should not be ignored when this important subject is under discussion. But it is also true that "the correspondence of the traitor, the murderer, the robber and the swindler, by means of which their crimes and frauds [can] be the more readily accomplished, and their detection and punishment avoided," are now by the laws of the United States made so "sacred" that they are not "accessible to the public justice, however deep might be the public interest involved in their production." But the same law that protects the correspondence of offenders against the laws protects that between the husband and wife, the parent and child, the lover and his mistress, the principal and his agent, the partner and his associate, the official and his constituent; in short, the correspondence in every relation of life. To protect the correspondence of the criminal is not the purpose of the post office laws: it is protected incidentally in protecting the general correspondence of the country, and because no possible method could be devised of discovering that which is meretricious without disclosing the infinitely larger quantity which is innocent. It is therefore protected because the interests that would suffer from the violation of secrecy are vastly greater than any that can be subserved. Indeed there is scarcely room for question that public justice would suffer instead of being aided by removing the protection of the law from private correspondence; for while an offender might now and then be discovered by seizing and opening his letters, the wrongs that might be accomplished by obtaining possession of the secrets of others who were using the mails innocently would so far outweigh the inconsiderable benefits, that the American people would never tolerate official surveillance of their private and business correspondence.

It will hardly do to dismiss such a subject with the off-hand remark that "the thief or the murderer is not to be heard to demand secrecy for his criminal communications," unless at the same time it can be shown that the official mind can by intuition select the vicious correspondence and pass by without inspection that which is harmless and innocent, and the privacy of which is absolutely essential to the peace and comfort of society.

We can understand how a court may hold that telegraphic correspondence is not beyond the reach of its process when there is no statute which forbids disclosure, because it may be said with some plausibility, though as it seems to us not justly, that the despatches have not been sent under any express or implied assurance of protection ;¹ but where the observance of secrecy is required by law, the right to have telegraphic communication protected, as that by mail is, seems unquestionable. Upon this subject the following propositions are affirmed :—

1. The statutes which forbid those intrusted with them from disclosing telegraphic communications are not restricted in their force to the imposition of penalties for disobedience, but they announce and establish a principle of public policy which is violated as distinctly when a telegram is brought into court for public exposure as when it is privately shown to persons having no right to it. The disclosure contravening and tending to defeat the policy of the law cannot be legalized by any judicial command or license.

2. The case is within the principle laid down in *Wilkes v. Wood* and *Entinck v. Carrington*. If one's private correspondence is to be given to the public, the method is not important ; it is equally injurious whether done by sending an officer to force locks and take it, or by compelling the person having the custody to produce it. A *subpena duces tecum* to the servant of Wilkes, commanding him to produce the desired letters and papers, would no doubt have been denounced by Lord CAMDEN in terms as vigorous and pointed as those which condemned the illegal warrants.

3. It is not only subject to all the mischiefs which attend the

¹ See *State v. Litchfield*, 58 Me. 267 ; s. c. 10 Am. Law Reg. (N. S.) 376, and Judge REDFIELD's Note. This learned jurist, evidently speaking of the case where disclosure is not prohibited, says: " The rule in regard to the inviolability of correspondence by telegraph is one mainly resting upon an honorary understanding between the company or their servants and their employers. It is not in any proper sense a perfect or legal duty or obligation. It certainly could not be made the basis of an action in court that the operators on a telegraph line had made the messages public, unless some pecuniary loss ensued to the parties sending or receiving the same." We doubt this, if secrecy were required by law. When the observance of secrecy for the benefit of individuals is positively enjoined by law, we see no reason for holding that the party concerned may be protected where a slight pecuniary interest is affected by the disclosure, but shall not be if it only touches him in what is still more important, his domestic or social relations. When any distinct legal right is violated an action will lie for it ; the extent of pecuniary injury is only a question of damages.

prying into correspondence by mail, but also to others of most serious character. The evils in other cases are, the exposure of family and other private confidences, the divulging of business and official secrets which parties, of right, are entitled to preserve, the furnishing of occasion for scandal and misconceptions, to the general disturbance of the community, and others of similar nature. But these are greatly aggravated in the case of telegrams, by the manner in which the correspondence is necessarily conducted.

Telegraphic communication is expensive. A long message sent by mail costs three cents, when if sent by telegraph it would cost, perhaps, a thousand times that sum. Economy of words is, therefore, highly important, and is studied by all classes. The message is made as brief as possible, and every word is omitted which can be spared and still express to the receiver the intended meaning. But this renders the message much more liable to misconception when read by those who know nothing of the previous correspondence or business, and who must therefore interpret it without the extrinsic assistance which the parties themselves would have. Mr. Dickens has shown, in the "*Bardell case*," how cunning or malice may extort from an abstracted communication almost any desired meaning; and what was caricature with the novelist might be reality in innumerable cases, if the proper and innocent correspondence of business men or of families were to be placed in the hands of those interested in perverting its meaning.¹

Telegraphic correspondence is necessarily exposed to two persons, the operators at the ends of the line. But it very often happens that reasons which are entirely proper will exist for concealing from the operators the real import of a message; and in such cases pains will be taken to express it in such terms that only the sender and the receiver shall understand it. It is a known and common method of correspondence that, by previous arrangement, certain words are fixed upon to represent ideas foreign to their proper meaning, or that arbitrary signs or expressions are made use of. Not only is this true in the case of business correspondence, but in the case of family correspondence; and even the government

¹ The fact that messages by telegraph may be unintelligible to all but the sender and receiver was recognised in *Rittenhouse v. Independent Line, &c.*, 1 Daly 474; s. c. on appeal, 44 N. Y. 463. The operator must receive and send messages as they are delivered to him, whether he understands them or not, and is liable for errors if he does not. Ibid.

makes use of a cipher where secrecy is important. When a cipher is employed, the discovery of the key will enable one to read it with accuracy; but a mistake in any one particular might be fatally misleading. But where the message is written out, with only the substitution of one or more arbitrary terms, to conceal the nature of the negotiation, or the subject of the communication, it may not only be misleading on its face, but there may be no possibility of arriving at the proper meaning without the explanation of the parties themselves. It will be remembered that the immense correspondence by which the national loans were effected was conducted by the use of arbitrary symbols. What was done on a large scale then is done by many business men, on a smaller scale, in their correspondence with agents and factors. To open this to the public is not only to subject the parties to all the annoyances, and expose them to all the risks, which must follow from seizing correspondence in the mail, but also to the dangers which must come from misconceiving an intent which has purposely been concealed.

Telegraphic communication, if not inviolable, offers a perpetual temptation to malice. A legislative committee may employ the power of calling for it to blacken the reputation of an opponent; a business rival may be annoyed and perhaps seriously compromised by means of it; a family feud may be avenged or quickened by bringing out confidential messages, and so on. All that is requisite is a suit, and a magistrate not over-nice respecting the admissibility of evidence, and the messages are always at hand, ready to be called for. To get letters, it might be necessary to resort to stratagem, and perhaps to violence. It is idle to say that these are merely fanciful and wholly improbable cases; they may occur at any time when the interest or the malice of others is sufficiently powerful to instigate proceedings which in law are baseless. Even the judge may not be able to protect the party whose communications mischief or malice would drag before the public; for, as Mr. Justice MAULE observed, in a case where an attempt was made to require an attorney to produce the title-deed of a third person, if the judge were to decide that it was not a proper instrument of evidence, "His decision might be made the subject of an argument in open court, by bill of exceptions; and thus the contents of the deed might be communicated to all the world." *Volant v. Soyer*, 10 C. B. 231, 235. In that manner the

mischief would be accomplished, whether the writing was or was not received in evidence.

The common law required an attorney to preserve an honorable secrecy respecting the communications made to him by his client; and this secrecy not even the process of the courts was suffered to unlock. The rule was based on an unquestioned principle of public policy, which invited clients to the freest possible communication respecting their affairs with the counsel called in to advise respecting them. The tendency of modern decisions has been to extend rather than to narrow the rule, from a conviction that though sometimes the cause of justice might be advanced by compelling disclosures, the evils that would result would greatly overbalance the possible advantages: *Foster v. Hall*, 12 Pick. 89; *Cromach v. Heathcote*, 2 Brod. & B. 4; *Regnell v. Sprye*, 10 Beav. 51; *Greenough v. Gaskell*, 1 Myl. & K. 98; *Moore v. Bray*, 10 Penn. St. 519.

Vice-Chancellor KNIGHT BRUCE has said with great force in one case that "truth, like all other good things, may be loved unwisely, may be pursued too keenly, may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion, and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself:" *Pearse v. Pearse*, 11 Jur. 52, 54. The learned Vice-Chancellor's condemnation of enforced disclosures would probably have been made still more emphatic and pointed if the case were such that what was disclosed would tend rather to lead away from the truth than to lead toward it. That the common law did not in like manner protect communications to medical and spiritual advisers has long been felt as a reproach, and legislation in recent years has removed this reproach in some states. Will it be said if by statute a clergyman is forbidden to disclose the secrets imparted to him for the purpose of obtaining spiritual advice and direction, that nevertheless a justice of the peace or judge may compel the disclosure? If so, are we not entitled to be told whence comes this power to dispense with the laws? It is not a power commonly supposed to exist in any department of the government, and if asserted, clear warrant ought to be shown for it. Especially ought that to be the case, when,

apparently, it would antagonize and defeat the very purpose for which the law was enacted.

It was conceded at the outset that there are cases in which telegrams are proper instruments of evidence, as private letters would be under like circumstances. Contracts are made by this species of correspondence, notices are given, orders are sent and information conveyed, and wherever either of the parties may have an interest in showing the facts, no one questions the right to use the telegrams for the purpose. But this is simply using their own documents, and contravenes no policy of the law. No doubt the telegraph may be used for the purposes of defamation; and in that case the dispatch may be produced as evidence by the receiver: *Williamson v. Freer*, Law Rep. 9 C. P. 393.

No one disputes the law of these cases; it is plain enough. What is disputed is, the right to compel the telegraph authorities to produce private messages which, by the course of the business are necessarily left in their possession, but under a confidence imposed by the law. If the operator can be compelled to produce them, then on the same reasons a postmaster may be brought into court and compelled to produce the undelivered postal cards for examination, though the law of Congress forbids his exhibiting them. And why may not a justice of the peace, or a legislative committee, compel a man's servant, left in temporary possession of his letters and diaries, to produce them for the examination of his enemies, and to furnish the reporters of daily papers with sensational literature? And if a search in a telegraph office and a seizure of a man's private correspondence is not an unreasonable search and seizure, on what reasons could the search for and exposure of his private journals be held to be an invasion of his constitutional right?

It may be said with truth that postal cards in the post office are in the custody of the law, and that may be assigned as the reason why their production cannot be compelled. This is true also of telegraphic communication in England. But the mere fact that they are in the custody of the law is no reason whatever for declining to require their production. The records of every court are in the custody of the law, and so is every enrolled statute. They cannot be taken from this custody, but the proper custodian may be required to produce them as evidence whenever the cause of justice may demand it. To the government it is a matter of indifference whether these communications shall or shall not be dis-

closed, except as, by discouraging the correspondence it might tend to affect injuriously the general interests of society. The reasons against disclosure are therefore reasons that concern individuals exclusively, or only concern the government as the disclosure may tend to defeat the purposes for which the government assumes the transportation and control of correspondence.

But, it is said, if telegrams may not be called for, then in many cases the truth may not be reached; and justice requires the fullest disclosure of the truth. As a general principle that is correct; but sages of the law, as wise as any now living, long ago determined that in many cases a full revelation of the truth would produce more evils than it could possibly prevent. Every case of privileged communication rests upon that ground; it is important that the truth should be known, but it is more important that a confidence essential in the particular relation should not be violated. A wife may know that her husband is a thief; it is important that his guilt should be proved; but to make the wife a witness against the husband is to endanger the relation on which, more than any other, our civilization depends. A spy is sometimes a greater public pest than a thief, and often a man might be more injured by having what he has innocently written or received, in the unreserved confidence of affection, given to the public, than he would be by being knocked down and robbed. Truth is important, but the state cannot afford to purchase the truth at the expense of principles on which alone a peaceful and contented society may repose.

In brief, then, the doctrine that telegraph authorities may be required to produce private messages, on the application of third persons, is objected to, on the following grounds:—

1. That it defeats the policy of the law, which invites free communication, and to the extent that it may discourage correspondence, it operates as a restraint upon industry and enterprise, and, what is of equal importance, upon intimate social and family correspondence.

2. It violates the confidence which the law undertakes to render secure, and makes the promise of the law a deception.

3. It seeks to reach a species of evidence which, from the very course of the business, parties are interested to render blind and misleading, and which, therefore, must often present us with error in the guise of truth, under circumstances which preclude a discovery of the deception.

4. It renders one of the most important conveniences of modern life susceptible at any moment of being used as an instrument of infinite mischiefs in the community. It is not necessary to enumerate these mischiefs. Any one can picture to his own mind what would be the condition of things in any neighborhood, if its whole correspondence were exposed to the public gaze. A single instance, in which the veil of confidential secrecy is thrust aside, will introduce some of these evils, but it will suggest the possibility that any moment all the others may follow.

T. M. C.

RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

THOMAS SNELL ET AL. v. THE ATLANTIC FIRE AND MARINE INSURANCE COMPANY.

Courts of equity have jurisdiction to relieve against mutual mistakes of the parties in the execution of written contracts, so as to make them conform to the real intention of the parties.

Such mistakes may be shown by parol evidence, but in all such cases parol evidence is to be received with great caution: and, where the mistake is denied, should never be made the foundation of a decree variant from the written contract, except it be of the clearest and most satisfactory character.

It is a general rule, that a mere mistake of law, stripped of all other circumstances, is not a ground for reforming a written contract founded on such mistake.

When, however, the mistake has arisen from a misapprehension of a rule of law, unaccompanied by any negligence on the part of the party seeking relief, or any *laches* in discovering and alleging the mistake, and the denial of relief by reforming the contract would enable the other party to obtain an unconscionable advantage, a court of equity—the mistake being clearly proved—will reform the instrument. In all such cases, the court will lay hold of any additional circumstances, fully established, which will justify its interposition, and prevent marked injustice being done.

A policy was issued to a partner in his own name and so expressed as only to cover his individual interest in the property, but he had effected the insurance for his firm and accepted the policy on the assurance of the insurer's agent that the whole partnership interest was covered by it. *Held*, that the firm were entitled to have the policy reformed in equity.

A policy of insurance against loss by fire contained a provision that, "If the situation or circumstances affecting the risk thereupon [the property] shall be so altered or changed, either by change of occupancy in the premises insured or containing property insured, or from adjacent exposure, whereby the hazard is increased, and the assured fail to notify the company; or if the title to said property shall be in any way changed * * * in every such case the risk thereupon shall cease and determine, and the policy be null and void." The cotton insured was, at the time the insurance was taken out, guarded by Federal soldiers, and was

subsequently, but without lawful authority, seized under orders of Federal officials, who subsequently retained the exclusive control and custody thereof, and guarded the same till the time of the loss : *Held*, that such change of control and custody not increasing the hazard, nor affecting the owner's title to the cotton, he was under no obligation to inform the company thereof ; and, that his failure to inform the company did not avoid the policy.

THIS was a suit in equity, instituted by Thomas Snell, Samuel L. Keith and Abner Taylor, partners under the firm-name of Snell, Taylor & Co., to reform a certain policy of insurance issued by the Atlantic Fire and Marine Insurance Company of Providence, and insuring Samuel L. Keith, from December 6th 1865, at noon, to January 7th 1866, at noon, against loss or damage by fire, in the sum of \$8000, on 220 bales of cotton, described as "stored in open shed at West Point, Miss. ; loss, if any, payable to Messrs. Keith, Snell & Taylor."

The material allegations in the bill were as follows : That said firm, on December 6th 1865, were the owners of 220 bales of cotton, worth more than \$50,000, stored at West Point, Miss., awaiting transportation to some northern market ; that Keith applied in behalf of his firm to Holmes & Bro., general insurance agents at Chicago, representing several companies, including the defendant in error, to procure insurance upon all the cotton, for the benefit of the firm, in the sum of \$49,500, during such time as it remained at West Point, which time was uncertain, in view of the difficulties of transportation ; that Holmes & Bro., the duly accredited and authorized agents, among others, of the defendant company, did agree with Keith, acting for and in behalf of his firm, to make, grant and secure insurance in the companies by them represented, on this cotton, in the sum of \$49,500, while it was stored at West Point, and until shipped to a northern market, and to receive a premium of one per cent. on the total amount insured, to wit, \$495, which sum Keith agreed to pay Holmes & Bro., provided the time for the insurance did not exceed one month, but to have a decreased rate if the time exceeded one month, the agreed rate to be paid by Keith when the cotton was removed from West Point, when the extent of the insurance could be definitely fixed ; that on the 6th December 1865, Holmes & Bro., with intent to carry this agreement into effect, caused to be made several policies in different companies, among them the policy sued on, making an aggregate insurance of \$49,500, and, after the loss occurred, notified Keith to pay, and he did pay, the sum of \$495, the premium on the whole

amount insured, \$80 of which was paid to and received by the defendant in error, for and on account of his firm, and in pursuance of the agreement with Holmes & Bro.; that the policy sued on remained in the possession of Holmes & Bro. until some time after the loss; that after the loss, and before any application to adjust the same was made, Holmes & Bro., with the intent to carry out the agreement that the cotton should be insured until its shipment from West Point, filled up the policy, so that by the terms thereof the insurance extended from December 6th 1865 until January 7th 1866, at noon; that Keith was assured by Holmes & Bro., when the insurance was taken, that it was not necessary that the policy should state in terms that the insurance was for, and on account of, Snell, Taylor & Co., and that the firm would be as fully protected, and the loss would be as promptly paid, as if the policy had expressly stated that the insurance was for and on its account; that, relying upon those assurances, and ignorant that, by the terms and legal effect of the terms employed, no other interest in the cotton was insured except his, Keith took the policy into his possession, in the full belief that it covered the entire interest of the firm; that soon thereafter, upon being advised to the contrary by his attorney, he demanded of the insurance agents that the policy be corrected so as to conform to the real contract and agreement, but Holmes & Bro. refused to correct or alter the same in any way.

The prayer of the bill was that the company be decreed and ordered to correct and reform the policy by inserting therein the stipulation that the insurance was made for the benefit or for the account of Snell, Taylor & Co., and that the firm have a decree for the sum so intended to be insured on the cotton.

The insurance company filed an answer, embracing certain grounds of defence, which sufficiently appear in the opinion.

The bill upon final hearing was dismissed, and from that final order this appeal is prosecuted.

The opinion of the court was delivered by

HARLAN, J.—1. We are satisfied that a valid contract of insurance was entered into, on the 6th December 1865, between Keith, representing Snell, Taylor & Co., and Holmes & Bro., representing the defendant and other insurance companies, and we entertain no serious doubt as to its terms or scope. Although there is some conflict in the testimony as to what occurred at the time the con-

tract was concluded, it is shown, to our entire satisfaction, not only that the agreed insurance covered the 220 bales of cotton, but that Holmes & Bro., with knowledge or information that the cotton was owned by Snell, Taylor & Co., and not by Keith individually, intended to insure, and, by direct statements, induced him to believe that they were giving insurance, in his name, upon the interest of the firm. He assented to the insurance being so taken in his name, because of the distinct representation and agreement that the interest of his firm in the cotton would be thereby fully protected against loss by fire so long as it remained at West Point. But according to the technical import of the words employed in the policy, which the company subsequently issued and delivered, only Keith's interest in the cotton is insured. Such is the construction which the company now insists should be put upon the policy in the event the court decides there was a binding contract of insurance. The fundamental inquiry, therefore, is whether Snell, Taylor & Co. are entitled to have the policy reformed so as to cover their interest.

We have before us a contract from which, by mistake, material stipulations have been omitted, whereby the true intent and meaning of the parties are not fully or accurately expressed. There was a definite, concluded agreement as to insurance, which, in point of time, preceded the preparation and delivery of the policy, and this is demonstrated by legal and exact evidence, which removes all doubt as to the sense and understanding of the parties. In the attempt to embody the contract in a written agreement there has been a mutual mistake, caused chiefly by that contracting party who now seeks to limit the insurance to an interest in the property less than that agreed to be insured. The written agreement did not effect that which the parties intended. That a court of equity can afford relief in such a case is, we think, well settled by the authorities. In *Simpson v. Vaughan*, 2 Atk. 33, Lord HARDWICKE said that a mistake was "a head of equity on which the court always relieves." In *Hankle v. Royal Exchange*, 1 Ves. Sr. 318, the bill sought to reform a written policy after loss had actually happened, upon the ground that it did not express the intent of the contracting parties. Lord HARDWICKE said: "No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts; so that if reduced into writing contrary to the intent of the parties,

on proper proof, that would be rectified." In *Gillespie v. Moon*, 2 Johns. Ch. 593, Chanc. KENT examined the question both upon principle and authority, and said: "I have looked into most if not all of the cases in this branch of equity jurisdiction, and it appears to me established, and on great and essential grounds of justice, that relief can be had against any deed or contract in writing founded in mistake or fraud. The mistake may be shown by parol proof, and the relief granted to the injured party, whether he sets up the mistake affirmatively by bill, or as a defence." In the same case he said: "It appears to be the steady language of the English chancery for the last seventy years, and of all the compilers of the doctrines of that court, that a party may be admitted to show, by parol proof, a mistake, as well as fraud, in the execution of a deed or other writing." And such is the settled law of this court: *Graves v. Boston Mar. Ins. Co.*, 2 Cranch 443; *Insurance v. Wilkinson*, 13 Wall. 231; *Bradford v. Union Bank*, 13 How. 66; *Hearne v. Marine Insurance Co.*, 20 Wall. 490, 496. It would be a serious defect in the jurisdiction of courts of equity if they did not have the power to grant relief against mutual mistakes or fraud in the execution of written instruments. Of course parol proof in all such cases is to be received with great caution, and where the mistake is denied, should never be made the foundation of a decree, variant from the written contract, except it be of the clearest and most satisfactory character. Nor should relief be granted where the party seeking it has unreasonably delayed application for redress, or where the circumstances raise the presumption that he acquiesced in the written agreement, after becoming aware of the mistake. Hence, in *Graves v. Boston Mar. Ins. Co.*, 2 Cranch 419, this court declined to grant relief against an alleged mistake in the execution of a policy, partly because the plaintiff's agent had possession of the policy long enough to ascertain its contents, and retained it several months before alleging any mistake in its reduction to writing. But no such state of case exists here. The policy in question was retained for Keith by the insurance agents. It was not surrendered to him, and he did not see it until after the loss had happened. Immediately upon being advised by his attorney that the policy as written did not cover the interest of the firm in the cotton, but only his individual interest, Keith promptly avowed the mistake, and asked that the policy be corrected in conformity with the original agreement. There was

no such acceptance by him of the written policy as would justify the inference that he had waived any rights existing under the original agreement, or had conceded that instrument to be a correct statement of the contract of insurance.

It may be said that the mistake made out was a mistake of law, and, therefore, not reformable in equity. It was said in *Hunt v. Rousmanier*, 1 Peters 15, to be the general rule that a mistake of law is not a ground for reforming a deed founded on such mistake, and that the exceptions to the rule were not only few in number, but had something peculiar in their character. The chief justice, however, was careful in that case to say that it was not the intention of the court "to lay it down, that there may not be cases in which a court of equity will relieve against a plain mistake, arising from ignorance of law." He said that he had found no case in the books, in which it has been decided that a plain and acknowledged mistake in law was beyond the reach of equity. In 1 Story's Eq. Jur., sec. 138, *e* and *f*, Redfield's edition, the author, after stating certain qualifications to be observed in granting relief upon the ground of mistake of law, says that "the rule that an admitted or clearly established misapprehension of the law does create a basis for the interference of courts of equity, resting on discretion, and to be exercised only in the most unquestionable and flagrant cases, is certainly more in consonance with the best considered and best reasoned cases upon the point, both English and American." The same author says: "We trust the principle, that cases may and do occur where courts of equity feel compelled to grant relief, upon the mere ground of the misapprehension of a clear rule of law, which has so long maintained its standing among the fundamental rules of equity jurisprudence, is yet destined to afford the basis of many wise and just decrees, without infringing the general rule that mistake of law is presumptively no sufficient ground of equitable interference."

In the case under consideration the alleged mistake is proven to the entire satisfaction of the court. It is equally clear that the assent of Keith to the insurance being made in his name was superinduced by the representation of the company's agent, that insurance, in that form, would fully protect the interest of the firm in the cotton. Assuming, as we must from the evidence, that this representation was not made with any intention to mislead or entrap the assured, it is, however, evident that Keith relied upon that repre-

sentation, and, not unreasonably, relied also upon the larger experience and greater knowledge of the insurance agents in all matters concerning the proper mode of consummating, by written agreement, contracts of insurance according to the understanding of the parties. He trusted the insurance agents with the preparation of the written agreement, which should correctly express the meaning of the contracting parties. He is not chargeable with negligence because he rested in the belief that the policy would be prepared in conformity with the contract. As soon as he had a reasonable opportunity to consult counsel he discovered the mistake, and insisted upon the rights secured by the original agreement. A court of equity could not deny relief under such circumstances, without enabling the insurance company to obtain an unconscionable advantage through a mistake for which its agents were chiefly responsible. In all such cases, there being no laches on the part of the party in discovering and alleging the mistake, equity will lay hold of any additional circumstances, fully established, which will justify its interposition to prevent marked injustice being done: *Wheeler v. Smith*, 9 How. 82.

In deciding, therefore, as we do, that the complainants are entitled to have the policy reformed in accordance with the original agreement, it is not perceived that we enlarge or depart, in any just sense, from the general and salutary rule that a mere mistake of law, stripped of all other circumstances, constitutes no ground for the reformation of written contracts.

We have not overlooked, in this connection, that portion of the evidence which shows that Holmes & Bro., when advising the company by letter, of the contract of insurance, stated in a postscript that the insurance would be for a few days only. The officers of the company testify that they would not have permitted the contract to stand, but would have promptly cancelled the policy, had they not supposed the insurance would last but a few days. It was doubtless the belief of Keith, which he expressed to the insurance agents, that the cotton would remain at West Point for a few days only. The evidence shows that he had reasonable ground for such belief. But he seems to have guarded against disappointment in that respect by having it distinctly agreed that the insurance should last until transportation could be obtained, and the cotton shipped from West Point. That Holmes & Bro. so understood the agreement is evident from their letter of December 6th

1865, to the secretary of the defendant company, in which they state that they had taken insurance "on 220 bales of cotton stored in open shed at West Point, Miss., said cotton to remain insured from above date *till time of shipment*." It is true that the response of the secretary shows that the company did not approve of such character of risks, but they did not repudiate the contract or require it to be cancelled, and only enjoined upon their agents "to decline such business in future." The act of the agents in filling up the blanks in the policy after the loss had occurred was manifestly in consummation of the original contract of insurance.

But independent of the issue in the pleadings, as to the mistake in reducing the contract to writing, the company defends the action and denies its liability, upon several grounds, which must now be considered.

2. The answer alleges that at the time, and prior to the alleged verbal contract of insurance, the cotton referred to in the bill was guarded, night and day, by soldiers of the United States, the shed in which the cotton was stored being occupied by such soldiers, who were in the habit of sleeping and eating their meals upon the cotton, and smoking and otherwise using fire upon and in its immediate vicinity; that those facts were material to the risk, and would, or might have influenced Holmes & Bro. and the company in taking the insurance, or in regard to the rate of premium to be charged, and that such facts, although well known to Keith when he applied for insurance, were not communicated by him to Holmes & Bro., or to the company, but were concealed, whereby the contract of insurance, whether reduced to writing correctly or not, became, and was void.

The evidence does not authorize a defence upon such grounds. The proof does not justify the belief that Keith, when applying for insurance, withheld any fact known to him and material to the risk. By the terms of the policy he was under an obligation to make a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, so far as the same were known to him, and were material to the risk. The same clause of the policy provides that the risk shall cease, and the policy become null and void, "if any material fact or circumstance shall not have been fairly represented." This language must, of course, be construed in connection with the preceding words of the same clause. We find no

evidence in the record showing that Keith did not fairly represent every material fact known to him. Rawley, who was within hearing of the conversation between Keith and Edgar Holmes (the active manager of the business of Holmes & Bro.), says, that while he cannot recall the language used, he is "positive that Keith explained the character of the risk. * * * I know Keith described the character of the risk fully." When Keith applied to Edgar Holmes for the insurance, the latter asked him how the cotton was stored. He replied that it was "stored in an open shed." Holmes then said to him that he did not like the manner in which it was stored, and Keith replied: "The cotton was guarded day and night." Thus were Holmes & Bro. notified of its exact condition and situation. The information that the cotton was guarded day and night, indicated that there was something in the surrounding circumstances which made a guard necessary for its safety. Indeed, if it was to remain, while under insurance, in an open shed, and at a point remote from the company's place of business, it was clearly in the interest of the insurer to have it guarded day and night. But it is said that the habits of the guard were such, at the time of the insurance, as to endanger its safety. If this were clearly proven, the evidence furnishes no ground for imputing to Keith, or Snell, or Taylor, knowledge of any habitual carelessness or misconduct upon the part of the guard, which increased the danger of the cotton being burned.

3. The answer further alleges that on the 8th December 1865, whatever cotton there was in the shed at West Point, belonging to the complainants, was seized by the United States government, or by its officers, under its orders and direction, excluding complainants thereafter from all possession and control over the cotton, and that such seizure and exclusion from possession and control were maintained until the cotton was burned; that after such seizure the shed passed to the exclusive possession of soldiers of the United States, who were in the habit of using the same for military defence, of sleeping and eating therein, and of smoking and otherwise using fire upon and in its immediate vicinity; that at the time of the alleged verbal contract of insurance, large quantities of loose cotton were lying under the flooring of the shed, which consisted of loose boards, and immediately under the cotton stored in the shed, whereby the risk of fire was greatly increased; that these facts were, each and all of them, material to the risk, and would or

might have influenced the judgment of Holmes & Co. and of the company, in regard to the continuing thereof, or in regard to the rate of premium therefor; that these facts were known to Taylor on the 8th December 1865, and in ample time before the fire to have communicated the same, and sufficiently long before to have enabled the defendant to cancel the policy and give complainants ample notice thereof; that by reason of the concealment of these facts by Taylor from the company and its agents, the policy became and was wholly void.

This defence is doubtless based upon that clause which declares that "if the situation or circumstances affecting the risk thereupon (the property) shall be so altered and changed, either by change of occupancy in the premises insured, or containing property insured, or from adjacent exposure, whereby the hazard is increased, and the assured fail to notify the company, or if the title to said property shall be in any way changed, * * * in every such case the risk thereupon shall cease and determine, and the policy be null and void."

It will be observed that no alteration or change in the occupancy of the premises containing the insured property avoids the policy, in the absence of notice to the insurer, unless it be such alteration or change as increased the hazard. We have already seen that the company's agents were informed, when the contract was made, that the cotton was guarded by day and by night. There was no change in the character of the guard, except that prior to December 8th 1865, it was guarded by Federal soldiers, as a personal favor to Taylor, while after that date it was guarded by the same soldiers under an order from Federal officers for the seizure of the cotton. There is some evidence that the soldiers were, at times, negligent and careless, but we are not satisfied that their conduct in and about the property was such as to increase the hazard. The strong presumption is that, in view of the peculiar condition of public sentiment at West Point and its vicinity, against Taylor and others who had been officially connected with the seizure and collection of cotton, under treasury regulations, the presence of Federal soldiers largely decreased, rather than increased, the hazard, and was, therefore, for the benefit of all parties interested in its preservation. We attach no weight to its seizure, under orders of Federal officers, as, in and of itself, affecting the rights of the assured. It appears satisfactorily from the evidence that it had been purchased

by Taylor for the firm of which he was a member, and with money furnished for that purpose by the firm. It does not appear that any of the cotton claimed by him for the firm, did, in fact, belong to the United States, or that it had become forfeited to the United States by reason of his violation of the laws of the United States, or of treasury regulations made in pursuance of such laws. Nor does it appear that he caused or promoted its seizure by officers of the United States. So far as the record shows, it was an unauthorized seizure of the private property of the citizen, caused by the personal hostility towards Taylor of one who had himself been suspended from his position as a treasury cotton agent, through the influence or machinations, as he suspected or believed, of Taylor. If, as alleged, the cotton, upon its seizure, passed from the control of the owner to the exclusive possession and control, for the time, of Federal officers, such change of control and possession did not, by the terms of the policy, impose upon the insured the duty of communicating to the company the fact of such change. It was only when the change in the surrounding circumstances increased the hazard that the assured was, by the terms of the policy, under an obligation to inform the company thereof. If the seizure of the cotton had involved a change in the title to the property, then the company could have elected to avoid the policy, since it contains express stipulations to that effect. But, as already said, the record furnishes no evidence of any change in title, but only a change of possession and control, without the assent, and, perhaps, beyond the power of the owner to prevent, and which does not clearly appear to have increased the hazard.

4. We come now to the only remaining question which it seems necessary to consider, viz., the quantity of cotton in the shed, belonging to Snell, Taylor & Co., at the time of the fire. * * *

[Here the judge reviewed the evidence upon the question of fact, not of any general interest.]

The decree of the court below is reversed, with directions to enter a final decree in conformity with this opinion.

The general maxim that ignorance or mistake of the law is no excuse, either for a breach, or for an omission of duty, is well settled, both at law and in equity. The maxim does not, however, apply to the laws of another state or country, mistakes as to the laws of which stand

upon the same footing as mistakes of fact: *Haven v. Foster*, 9 Pick. 130; *Kenny v. Clarkson*, 1 John. 385; *McCormick v. Garnett*, 5 DeG., M. & G. 278. It was said also, by Lord WESTBURY, in *Cooper v. Phibbs*, L. R. 2 H. L. 170, that the maxim applies only to the

general law of the country, and not to mere private right, *e. g.* title to property; and that private right of ownership is a matter of fact; a distinction which will be again referred to further on. Although, however, the authorities generally lay down the rule, that, where there has been a full knowledge of all the facts, equity will not relieve against mere mistakes in matters of law (1 Story's Eq. Jur. §§ 113, 116; Snell's Eq. (4th ed.) 428; Willard's Eq. Jur. *60), there are certain exceptional cases, and the true boundaries of the rule in equity seem involved in considerable doubt. The rule is laid down by Judge STORY (1 Eq. Jur. § 116), that "Agreements made and acts done under a mistake of law are (if not otherwise objectionable) generally held valid and obligatory;" "that a mistake of law is not ground for reforming a deed founded on such mistake. And, whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their character, and to involve other elements of decision." See, also, 1 Story's Eq. Jur. § 137; Willard's Eq. Jur. *60; *Hurd v. Hall*, 12 Wisc. 124; *Jordan v. Stevens*, 51 Me. 81.

The cases usually mentioned as exceptions are:

(1) Where a party has acted under a misconception as to, or ignorance of, his title to the property, respecting which some agreement has been made, or conveyance executed, as to which, so far as concerns mistakes of law, Judge STORY remarks: "That many, although not all of the cases, will be found to have turned, not upon the consideration of a mere mistake of law, stripped of all other circumstances, but upon an admixture of other ingredients going to establish misrepresentation, imposition, undue confidence, undue influence, mental imbecility, or that sort of surprise which equity uniformly regards as a just foundation for relief:"

1 Story's Eq. Jur. § 120. See, also, *Whelen's Appeal*, 70 Penn. St. 410, 427.

Under this head comes the doctrine, that, where a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his undisputed property to another, under the name of a compromise, equity will relieve him from the effects of his mistake: 1 Story's Eq. Jur. § 121; *Freeman v. Curtis*, 51 Me. 140. See also Willard's Eq. Jur. (Potter's ed.) *68; as to which Judge STORY's explanation is, that, where the party acts upon the misapprehension that he has no title at all to the property, it seems to involve in some measure a mistake of fact of ownership, arising from a mistake of law; (see also *Cooper v. Phibbs*, *supra*; *Freeman v. Curtis*, *supra*); and that the case of a mistake of a plain and understood rule of property might well give rise to a presumption that there has been some undue influence, imposition, mental imbecility, surprise, or confidence abused, in which case the mistake of law is not the foundation of relief, but only the medium of proof to establish some other proper ground of relief: 1 Story's Eq. Jur. §§ 122, 128, 130; Snell's Eq. (4th ed.) 429. The first explanation seems unsatisfactory, and concerning it Judge REDFIELD has well said: (1 Story's Eq. Jur. (Redfield's ed.) § 130 note, § 138 a), that "the idea of there existing in this class of cases a mistake of fact as well as of law, might, perhaps with equal force apply to all cases of mistake of law. The true state of the law is always a fact. * * * In regard to the law of the place of the forum, both the court and the parties are presumed to know it, and are bound to take notice of it. It is rather upon this ground, we apprehend, that courts of equity decline to interfere and grant relief upon the basis of alleged mistakes of the law of the forum, than because there is any inherent difference between

a *bona fide* misapprehension of law and of fact, or between the mistake of the law of the forum and that of a foreign state. * * * The distinction between mistakes of law and of fact, so far as equitable relief is concerned, is one of policy rather than principle." See *Jordan v. Stevens*, 51 Me. 80. It may also be observed of the first of Judge STORY's explanations, above quoted, that, if allowed its proper latitude, it would, as it seems, annihilate all distinction between mistakes of law and of fact.

The cases upon this point have, also, been attempted to be reconciled upon the distinction, before alluded to, between the word *jur*, as used to indicate general law, and the same word as employed to denote private right, a mistake as to the general law being irremediable in equity, while a mistake in regard to individual rights may, it is said, under certain circumstances be redressed: *Cooper v. Phibbs*, *supra*; Bisp. Eq. (2d ed.) sect. 187. Whatever may be the explanation of the before stated doctrine as to compromises, the exception itself seems settled upon authority: *Naylor v. Winch*, 1 Sim. & Stu. 555; *Jones v. Munroe*, 32 Geo. 188; *Freeman v. Curtis*, *supra*; 1 Story's Eq. Jur. § 121.

(2) Another apparent exception is where, through ignorance or mistake of the law as to the proper mode of framing the instrument, there has been a defective execution of the intent of the parties, in which case equity will grant relief: 1 Story's Equity Jur. § 136; *Pitcher v. Hennessey*, 48 N. Y. 424; *Maher v. Hibernia Ins. Co.*, 67 Id. 283; *Sparks v. Pittman*, 51 Miss. 511; *Longhurst v. Star Ins. Co.*, 19 Iowa 364; *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346; *Hunt v. Rousmaniere*, 1 Pet. 13; *Stover v. Poole*, 67 Me. 217, 223; *Adams v. Stevens*, 49 Id. 362; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Oliver v. Mut. Com. Ins. Co.*, 2 Curt. C. C. 277; *Larkins v. Biddle*, 21 Ala. 252; *Evans v. Strode*,

11 Ohio 480; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Beardsley v. Knight*, 10 Verm. 185; *Green v. Morris, &c., Railroad*, 12 N. J. Eq. 165; *Canedy v. Marcy*, 13 Gray 373; *Chapman v. Laytin*, 1 Edw. Ch. 467; s. c. 6 Paige 189; 18 Wend. 407. See, also, *Cockerell v. Cholmeley*, 1 Russ. & Myl. 418; *State v. Paup*, 13 Ark. 129.

Subject to the above exceptions, it may perhaps be considered as settled by authority that a mere mistake in matter of general law (as distinguished from private right), stripped of all other circumstances, is not ground for reforming a written contract founded on such mistake: 1 Story's Eq. Jur. (Redfield's ed.) §§ 113, 138-138 b; *Bank of United States v. Daniel*, 12 Pet. 32, 55, 56; *Stover v. Poole*, 67 Me. 217; *Glenn v. Staller*, 42 Iowa 107. Judge STORY states (1 Equity Jur. § 138) that the present disposition of courts of equity is to narrow rather than to enlarge the operation of the exception. See, also, Snell's Eq. (4th ed.) 428, 429; 1 Story's Equity Jur. § 120; Willard's Eq. Jur. *60, 64. Judge REDFIELD seems to favor a more liberal view—though he is not very definite in stating the limits of the exceptions; see 1 Story's Eq. Jur. (Redfield's ed.) 138 a-138 l—and sums up the principles applicable to mistakes in law by stating that "where the mistake is of so fundamental a nature that the minds of the parties have never in fact met, or where an unconscionable advantage has been gained by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff, either in falling into the error, or in not sooner claiming redress, and no intervening rights have accrued, and the parties may still be placed in *statu quo*, equity will interfere in its discretion to prevent intolerable injustice." See, also, *Stover v. Poole*, 67 Me. 217, 223. The above may probably be considered as definite a statement of the law upon the

subject as the present state of the authorities will warrant, the rule being as yet not entirely settled.

Courts of equity however, as stated in the principal case, will be vigilant to lay hold of any extraneous circumstances which will justify their interposition to prevent marked injustice being done : 1 Story's Eq. Jur. (Redfield's ed.) § 138 c, note ; Bisp. Eq. (2d ed.) § 188. They will relieve against a mistake of law even when brought about by innocent misrepresentation. (See the cases cited at the end of this note.) And where a mistake is manifest, and it is doubtful whether it is a mistake of law or of fact, they will presume it to be a mistake of fact, until it is shown that all the facts were known : *Hurd v. Hall*, 12 Wis. 112, 131.

Returning to the principal case, it seems to be very clearly correct ; for, as stated by the court, "The written agreement did not effect that which the parties intended," and had previously agreed upon ; which would bring the case within the second class of cases above referred to. Moreover, the mistake was induced by the representation of the insurance agent that the policy as written would fully protect the interest of the firm ; and, as we have seen, a mistake of law, caused by misrepresentation, though innocent, is a ground of equitable relief ; see *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517 ; *Longhurst v. Star Ins. Co.* 19 Iowa 364 ; *Jordan v. Stevens*, 51 Me. 78 ; *Freeman v. Curtis*, Id. 140 ; *Green v. Morris*, 8 C. R. R., 12 N. J. Eq. 165.

MARSHALL D. EWELL.

Supreme Court of Michigan.

JOHN McEWEN v. CHARLES ZIMMER.

By a statute of the dominion of Canada, a judgment is permitted to be rendered against a person resident abroad, on a service made upon him out of the dominion. A citizen of Michigan was sued in Canada and service of process made in Michigan. He did not appear in the suit, and judgment was taken by default. Suit being brought on the judgment in Michigan, *Held*, that it was a nullity.

No sovereignty can subject persons not within its limits to the jurisdiction of its courts by constructive service, or by service made within the limits of another sovereignty.

THIS was an action upon a judgment purporting to have been rendered by the county court of county Essex, in the Province of Ontario, Dominion of Canada, in favor of McEwen against Zimmer. The only question which the record presented was one of jurisdiction in the county court of Essex to render the judgment, and this arose upon the service which was made upon the defendant. Zimmer was proceeded against as a non-resident under certain provisions of the statutes, known as the Consolidated Statutes of Upper Canada, by which upon a cause of action arising in Upper Canada a writ is allowed to be issued and served upon the defendant outside the jurisdiction of Canada, and upon such service the action may proceed to judgment.

Zimmer, it was conceded, was not a British subject, and the record of the judgment in the county court showed that the only service made upon him was made at the city of Detroit, in this state. It also showed that he did not, in any manner, respond to the service, and that judgment was taken against him by default. No property appeared to have been attached in the province, and no jurisdiction to render the judgment was claimed, unless the service in Detroit conferred it. The court below held that the judgment was a nullity.

The opinion of the court was delivered by

COOLEY, J.—The only question the record presents may be stated as follows: Whether it is competent for a foreign court to make service of its process in this state, and on the authority of such service to proceed to judgment against a party who refuses to recognise the jurisdiction.

We had not supposed, until this suit was brought to our attention, that such a jurisdiction could seriously be contended for. The rule laid down by Judge STORY in his *Conflict of Laws* has been supposed to be of universal acceptance, that “no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals.” *Conf. of Laws*, § 539. Mr. Wharton repeats this rule, as one not questioned: *Conf. of Laws*, § 712; and it is believed to have been recognised in every case arising in the courts of this country in which the exact point has been presented. If any case is an exception, it has escaped our attention.

It is urged, however, that the rule in Great Britain and the British provinces is otherwise, and that comity requires that we recognise and accept the rule of jurisdiction that prevails where the judgment was rendered. The obligations of international comity, we trust, will never be questioned in this state, especially when they are invoked in behalf of our neighbors of the Dominion, with whom our relations are so intimate, and it may be added, so friendly and cordial. We should certainly never have the assurance to demand from them more than we would freely and voluntarily concede to them. True comity is equality, we should demand nothing more and concede nothing less.

The English decisions having direct bearing on the question are not very numerous: *Douglas v. Forrest*, 4 Bing. 686, was an action in England upon a Scotch judgment, obtained without personal service, and after notice to the defendant by the process called "horning," which may or may not have ever come to his knowledge. The validity of the judgment was recognised, and the action sustained. But an inspection of the case and a reading of the opinion of Chief Justice BEST will disclose the fact that the rule, as laid down by Mr. Justice STORY, in his treatise on the Conflict of Laws, is in no manner assailed or questioned. The defendant was executor of a Scotch estate, and it was in that capacity that he was sued; and the jurisdiction was supported on the express ground that the estate was within the jurisdiction of the Scotch court, and that the defendant himself owed allegiance to that country. "To be sure," says the chief justice, "if attachments issued against persons who were never within the jurisdiction of the court issuing them could be supported and enforced in the country in which the person attached resided, the legislature of any country might authorize their courts to decide on the rights of parties who owed no allegiance to the government of such country, and were under no obligation to attend its courts or obey its laws. We confine our judgment to a case where a party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given whilst the debtor resided in it."

In *Bequet v. McCarthy*, 2 B. & Ad. 951, the judgment in question was rendered in one of the British colonies, and by the law of the colony, if the defendant was absent and could not be personally served, the service was permitted to be made on the king's attorney-general for the colony. It was so made in that case; the defendant, who was an official lately domiciled in the colony, being then absent. The substituted service was sustained as sufficient. It was made within the jurisdiction of the court, and the case is therefore not analogous to the present, and we have no occasion either to approve or question it. Our laws provide in some cases for a substitute for personal service where the party is within the jurisdiction or only temporarily absent, and where the substitute is such as with reasonable certainty will bring the proceeding to the

knowledge of the respondent, it is perhaps competent to give to such service the full effect of that made upon a person, but no such question is now before us.

In *Bank of Australasia v. Nias*, 16 Q. B. 717, the defendant, who was a stockholder in a joint stock company in New South Wales, was sued in England on a liability as such stockholder, which it was claimed was established by a judgment against the chairman of the company in New South Wales, under a statute which permitted the chairman to be sued as representative of the company. The statute was sustained, and the action was supported. Lord CAMPBELL, in his opinion, declares that the statute was passed for the benefit of the company, and that there was nothing at all repugnant to the law of England, or to the principles of natural justice, in enacting that actions upon contracts made by the company, instead of being brought individually against all the stockholders, should be brought against the chairman whom they had appointed to represent them. The case is treated as one in which the parties, by accepting the benefits of a statute, had consented to certain forms of procedure for which it provided.

A case more important to the present discussion is that of *Schibsby v. Westenholz*, Law Rep. 6 Q. B. 155. The action in that case was upon a French judgment, obtained without personal service of process, under a statute not differing essentially from the statute of Upper Canada, which is supposed to sustain the judgment now in question. The only difference of moment between that case and the present is that there the contract on which the French court gave judgment was an English contract, while in this case the judgment was given for services performed by the plaintiff in Canada, and possibly it may be claimed that the implied contract to pay for these services was a Canada contract, though the defendant was not in Canada at the time. Whether this difference has any legal significance will be considered further on. Putting this circumstance aside, the two cases are strictly analogous, and it is fortunate that, in passing upon the force that should be given to a Canadian judgment under the circumstances, we are afforded the light of a decision by one of the courts at Westminster on the very point in dispute.

It should be stated here that the statute of Upper Canada was a substantial reproduction in that province of the provisions of the

English Common Law Procedure Act (1852), which in terms permit judgment to be taken against persons out of the realm on a service of process made abroad. The case was therefore one in which it might be urged with great force that comity required that the courts in England should recognise the validity of judgments obtained in France upon a service precisely analogous to that which the English statute made sufficient to support a judgment in that country. BLACKBURN, J., in delivering the opinion of the court, proceeded to declare as the true principle on which the judgments of foreign tribunals are enforced in England, that stated by PARKER, B., in *Russell v. Smyth*, 9 M. & W. 819, and repeated in *Williams v. Jones*, 13 M. & W. 633, that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts of England are bound to enforce, and that consequently anything which negatives that duty or forms a legal excuse for not performing it, is a defence to the action, proceeds to say: "We were much pressed on the argument with the fact that the British legislature has, by the Common Law Procedure Act (1852), conferred on our courts a power of summoning foreigners, under certain circumstances, to appear, and in case they do not, giving judgment against them by default. It was this consideration principally which induced me at the trial to entertain the opinion which I then expressed and have since changed; and we think that if the principle on which foreign judgments were enforced was that which is loosely called "comity," we could hardly decline to enforce a foreign judgment given in France against a resident of Great Britain, under circumstances hardly, if at all, distinguishable from those under which we, *mutatis mutandis*, might give judgment against a resident in France; but it is quite different if the principle be that which we have just laid down. Should a foreigner be sued under the provisions of the statute referred to, and then come to the courts of this country and desire to be discharged, the only question which our courts could entertain would be whether the acts of the British legislature, rightly construed, gave us jurisdiction over this foreigner, for we must obey them. But if judgment being given against him in our courts, an action were brought upon it in the courts of the United States—where the law as to the enforcing foreign judgments is the same as our own—a further question would be opened, viz., not only whether the British legislature had given

the English courts jurisdiction over the defendant, but whether he was under any obligation which the American courts could recognise, to submit to the jurisdiction thus created." And further on he says that the real question which the court of the United States must pass upon in the supposed case would be this: Can the island of Great Britain pass a law to bind the whole world? A question which he ventures to answer without hesitation in the negative.

But for a single remark in this opinion by Mr. Justice BLACKBURN, it should, as it seems to us, be accepted on all sides as covering completely the present case. The remark referred to is in the nature of a suggestion, that if at the time when the obligation was contracted the defendants were in a foreign country, but left it before the suit was instituted, perhaps the laws of the foreign country ought to bind them. The remark was not relevant to any facts then before the court, nor, in our opinion, does the present case require us to consider how far the suggestion has force. This defendant was not in Canada when the demand accrued, and in no manner has he submitted himself to its laws, unless he can be said to have done so in employing the services of the plaintiff in that country. If we might assume, which we cannot under the circumstances, that the supposed contract was a Canada contract, it is not by any means clear to our minds that the fact should affect the decision. If the obligation on the courts of one country to enforce the judgments of another be grounded in comity, it ought to appear that under corresponding circumstances it would be expected in this state that the courts of Canada would enforce a judgment given in Michigan on a Michigan contract against a resident of Canada, who was never served with process, except in the Dominion. So far is it from being the fact that such an expectation would exist, that the courts of this state are not permitted, by virtue of any statute or of any principles supposed to be derived from the common law, to render any such judgment; and should it by inadvertence, or by mistake of law, be entered up by any court of this state, any other court, and indeed the party defendant, might treat it, so far as it assumes to establish a personal demand against him, as an absolute nullity. No better illustration of the views held by our own courts upon this subject can be instanced than the case of foreclosure suits in equity against non-resident mortgagors where, although the case may proceed to decree on notice given by publication, or personally served in a foreign jurisdiction, yet the notice

is never accepted as the full substitute for service of process within the state, and though the case goes to a decree for the sale of the land, a personal decree against the party liable for the mortgage debt is never permitted to be taken upon such notice: *Lawrence v. Fellows*, Walk. Ch. 468; *Outwhite v. Porter*, 13 Mich. 533; *Tyler v. Peatt*, 30 Mich. 63. We may then dismiss comity from consideration as constituting any basis for the enforcement of the judgment now before us. We should certainly, *mutatis mutandis*, not expect it to be enforced. And we may add that in the still more pointed case of the attachment of lands of a non-resident as the commencement of a suit to collect a debt, though the statute provides for the case proceeding to judgment against the defendant on proof of the statutory notice by publication, yet the judgment is not regarded as establishing a personal demand against the defendant, and we should neither expect it to be enforced as such abroad, nor enforce it ourselves. This is so well understood in this state that the point is never mooted.

On the other hand, if the obligation to enforce a foreign judgment is to be rested on the duty or obligation of the defendant to pay the sum for which the judgment was given, as Mr. Baron PARKE and Mr. Justice BLACKBURN suppose, then it is important to know from what such duty or obligation springs. It is certain that it cannot spring from the mere fact that some court has assumed to render a judgment, but the proceedings anterior to the judgment must have been such as fairly imposed upon the party sued the obligation to appear and make his defence to the demands set up, if any he have; and if, under the circumstances, he was fairly entitled to treat any notice of the suit which may have been given him as unwarranted, and to disregard it, then it seems plain that no obligation to recognise the conclusions of the court could possibly arise. The question, then, seems to be narrowed to this: whether the service of process beyond the jurisdiction of the court issuing it, can impose upon the party served the obligation to appear in the suit and make there his defence, if he has any? If this question must be answered in the affirmative as regards a judgment rendered in Canada, it must receive a like answer when it contemplates a judgment rendered on a like service in New Zealand, or in one of the colonial courts of the Dutch East Indies. The question, therefore, is not one to be disposed of on a consideration of merely how this defendant might be affected; but it sug-

gests the possible cases of citizens of this country proceeded against in the remotest borders of civilization, on claims which may or may not have a foundation in justice, but which become established claims by default in making answer to a suit upon them.

Now the service of process is for the purpose of notifying the defendant, and giving him a fair opportunity to defend. But the service of process in Michigan, which requires one to appear and answer to a demand in a foreign country would in general be of no value whatever, because a defence abroad would either be practically impossible, or would be so expensive as to exceed in cost the importance of the demand. It may therefore justly and emphatically be declared that such service would give no fair opportunity to defend, and consequently could not accomplish the purpose of process. Were the doctrine accepted which would permit it, it might reasonably be anticipated that fictitious claims would be asserted abroad against Americans, who, for business or pleasure, had visited foreign countries, and would become established claims by default in a defence which a party wrongfully charged could not afford to make. We think the doctrine has no foundation in reason, or in the principles of international law or international comity.

We refer, as supporting these general views, to *Bischoff v. Wetherall*, 9 Wall. 812, and *Wood v. Parsons*, 27 Mich. 159. Also to *People v. Dawell*, 25 Mich. 247, where the general subject received some attention.

We find no error in the judgment, and it must be affirmed with costs.

The same conclusion has been reached by the courts of many of the states, in the following cases, amongst others: *McVicker v. Budy*, 31 Me. 314; *Wood v. Watkinson*, 17 Conn. 500; *Woodward v. Tremure*, 6 Pick. (Mass.) 354; *Kane v. Cook*, 8 Cal. 449; *Rangle v. Webster*, 11 N. H. 299; *Winston v. Taylor*, 28 Mo. 82; *Jones v. Spencer*, 15 Wis. 583; *Price v. Hickock*, 39 Vt. 292; *Williams v. Preston*, 3 J. J. Marsh. 600; *Davidson v. Sharpe*, 6 Ired. L. 14; *Arndt v. Arndt*, 15 Ohio 83; *Whittier v. Wendell*, 7 N. H. 257; *Miller v. Miller*, 1 Bailey (S. C.) 242; *Zepp v. Hagar*, 70 Ill. 223; *Frothingham v. Barnes*, 9 R. I. 474.

The question of the validity and effect of foreign judgments, or those of a sister state, and the reason urged in their favor, was quite carefully and elaborately considered by Mr. Justice FIELD in the recent case of *Pennoyer v. Neff*, 95 U. S. (5 Otto) 714, his conclusions being perhaps fairly stated in a quotation taken by him from the opinion of Mr. Justice MILLER, in *Cooper v. Reynolds*, 10 Wall. 308, where, speaking of the effect of a judgment rendered in an action commenced by attachment against a non-resident, he says, "If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains

liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant and no service of process on him the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of the proceeding, in this latter class of cases, is clearly evinced by two well established propositions: 1st, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained upon such a judgment in the same court or any other, nor can it be used as evidence in any other proceeding, not affecting the attached property; nor could the costs of that proceeding be collected out of any other property than that attached in the suit. 2d. The court, in such a suit, cannot proceed, unless the officer finds some property of the defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court.'

In that case, *Pennoyer v. Neff*, the action was to recover possession of lands held by defendant, under title acquired at a sale, on execution issued on a personal judgment rendered without personal service or appearance, but after service by publication in the manner prescribed by the laws of the state of Oregon. The defendant was not a resident of that state, but had property in the state subject to attachment or execution, the land in question. The law of Oregon permitted service by publication,

"where the defendant is not a resident of the state, but has property therein, and the court has jurisdiction of the subject of the action." The suit was not commenced by attachment, but the first step taken to subject the land to the payment or securing of the claim was the execution levy. It was claimed on the part of the execution purchaser that, under the clause of the statute above quoted, no proceeding in the nature of an attachment was necessary, but that the fact of defendants owning property in the state was sufficient to give the court jurisdiction, by substituted service, to render a personal judgment which could be enforced, at least, against such property. But the court held not: that the jurisdiction to inquire into the obligations of a non-resident at all is only incidental to the jurisdiction over the property; and until the court has obtained such jurisdiction over the property by some proceeding in the nature of an attachment, it could obtain none over the defendant.

The questions, which have most frequently been considered by the courts, arising upon foreign judgments, are those relating to the extent to which evidence may be received, explaining or contradicting the recitals of the judgment showing jurisdiction.

In *People v. Dawell*, 25 Mich. 247, cited by Judge COOLEY in his opinion, the record of a divorce granted by an Indiana court was under consideration, and it was proposed to show that the petition, which was recited to have been filed by the wife, was so filed by an attorney who had no authority from the wife to do so. The opinion of the court was upon the ground that the record of the judgment might be impeached by a showing that the wife had never been a resident of Indiana, and that the court could not, therefore, have had jurisdiction of the subject-matter of the action; but Judge CAMPBELL, in his dissenting opinion, discusses the question, more es-

pecially, of the right of a party to an action based upon a judgment rendered in another state, to show *dehors* the record that he was not a resident of that state, or within the jurisdiction of the court, and that an attorney who appeared for him was unauthorized. The following cases hold that he may do so: *Harrod v. Barretto*, 2 Hall (N. Y.) 302; *Aldrich v. Kinney*, 4 Conn. 380; *Shumway v. Stillman*, 6 Wend. 447; *Hull v. Williams*, 6 Pick. 232; *Shelton v. Tiffin*, 6

How. 163; *Pennywit v. Foote*, 27 Ohio St. 600; *Sherrard v. Nevins*, 2 Ind. 241; *Pollard v. Baldwin*, 22 Iowa 328; *Norwood v. Cobb*, 15 Tex. 500; *Watson v. New England Bank*, 4 Metc. (Mass.) 343; *Houston v. Dunn*, 13 Tex. 476. For an expression of the opposite view, see *Wilcox v. Kassick*, 2 Mich. 165, and *Baker v. Struebraker*, 34 Mo. 172, following *Warren v. Turk*, 16 Id. 102.

E. A. C.

United States Circuit Court, Western District of Missouri.

BAKER v. THE KANSAS CITY TIMES CO.

In an action for libel, where defendant justifies a charge of crime, the defence must be established to the entire satisfaction of the jury, by which is meant that the evidence must produce an abiding conviction upon the minds of the jury of the truth of the charge; but the defence need not be established beyond a reasonable doubt, or with the certainty required to sustain an indictment.

In such a case the party charged with a crime is presumed to be innocent, and the burden of proof is on the plaintiff to establish the guilt of defendant, and where there are acts or statements of the defendant fairly admitting of two meanings, the jury should apply the meaning leading to innocence rather than guilt.

The truth of an alleged libel is, when established, a complete justification of the publication, and bar to the action.

But a party failing to establish his plea of justification, may show, in mitigation of damages, anything tending to establish that he acted without malice or bad intent, but from proper motives.

Absence of actual malice is no bar to an action of libel where the publication is not privileged. The malice implied by law is sufficient upon which to maintain the action, and this cannot be rebutted so as to defeat the action.

Where a plea of justification is not sustained, it is the duty of the jury to award damages to the plaintiff, but the amount thereof should be left to their discretion.

Semble, a party under reasonable apprehension of danger of life or great bodily harm, has a right in self-defence to take the life of the aggressor, but he must have had no agency in bringing about the danger upon which he relies to justify the taking of life.

In law, one becomes an accessory who is guilty of an act of felony, not by committing the offence in person, or as a principal, but by advising or commanding another to commit the crime.

THIS was an action for libel; plea justification. The facts sufficiently appear in the charge.

M. J. Leaming, A. B. Jetmore and H. B. Johnson, for plaintiff.

John K. Cravens and John W. Wofford, for defendant.

KREKEL, J., charged the jury as follows: During the year 1877, there were published in Topeka, in the state of Kansas, two newspapers, one called the *Commonwealth*, owned and controlled by Floyd P. Baker, the plaintiff in this suit, the other called the *Blade*, controlled by J. Clark Swayze. During the same year, 1877, two other newspapers were published, one in Leavenworth, in the state of Kansas, known as the *Leavenworth Times*, the other in Kansas City, in the state of Missouri, known as the *Kansas City Times*, published by the defendant in this suit. The paper issued by this corporation is under the management and control of Morrison Mumford, who has testified in the case. In the Sunday's issue of the *Kansas City Times*, of April 1st 1877, a communication appeared, dated Topeka, Kansas, March 29th 1877, signed M. C. M., in which reference is made to Baker, plaintiff in this action, as follows:

"The cloud of sorrow, caused by the felonious killing of J. Clark Swayze, has not yet passed away in this city; on the contrary, it thickens every hour, and the funeral of Mr. Swayze to-day, places a condemnation upon the villainous part which F. P. Baker took in the sacrifice of his life, seldom visited upon the acts of any man * * * It was undoubtedly the object of those who conspired against the life of Mr. Swayze—Baker in particular—to murder the *Blade* by killing its editor; but in this they have signally failed, as the numerous assurances on part of the business men of Topeka, that the paper should have their undivided support, will show. I am reliably informed that ten new names were handed into the office last evening as subscribers to the *Blade*, all of whom had previously taken the murderer's organ."

Of these two extracts, taken from, and a part of the correspondence, Baker, the plaintiff, complains and brings his action against the *Kansas City Times* for damages.

To this complaint the defendant, the *Kansas City Times*, answers by setting up, first, the facts and circumstances under which the publication was made; next, a justification, alleging "that said letter is true, for that the said F. P. Baker did, on the 28th day of March 1877, and for some considerable time prior thereto, encourage and countenance the said John W. Wilson, in hostile acts toward the said Swayze, and in assaults upon the said Swayze, by

the said Wilson, and so encouraged and supported by plaintiff said Wilson, did, on the 28th day of March 1877, kill the said Swayze."

It becomes unnecessary to examine whether these pleas are technically and formally correct, for they have been replied to and treated as substantially sufficient. As this plea of justification disposes of the case in favor of the defendant, if found to be true, it is proper that it should be taken up first.

You will have to ascertain, in the first place, whether the correspondence charges that Swayze was murdered—that is, killed by Wilson, deliberately and with malice aforethought, for it would not be murder if Wilson had killed Swayze in self-defence. Should you come to the conclusion that the correspondence does charge that Wilson murdered Swayze, it will become your duty, in the second place, to ascertain whether the charge is true. The defendant, the *Kansas City Times*, makes this allegation and is bound to prove it to your entire satisfaction. Now, for the purpose of ascertaining whether Wilson murdered Swayze, or acted in self-defence when he killed him, you will bring before your mind all the facts and circumstances testified to, existing prior to the killing, in order to arrive at the motives and intent with which Wilson went across the street and sought Swayze, as well as to ascertain the motives of Swayze in acting as he did. Wilson had a right to cross the street and remonstrate with Swayze against the publications in the *Blade*, and if that was the sole purpose with which he addressed Swayze, Wilson was in the right. But in trying to arrive at the intent of Wilson crossing the street and addressing Swayze, it will be proper for you to take into consideration the existing feeling and apprehensions of the parties, and if you shall find that Wilson calculated thereon as probably bringing about a personal difficulty—seeking rather than avoiding such—he, Wilson, being prepared, and intending, if such difficulty occurred, to make use of it for the purpose of killing Swayze, in such a case, Wilson cannot be said to have acted in self-defence, and the killing of Swayze would be murder. A party under reasonable apprehension of danger of life or great bodily harm, has a right in self-defence to take the life of the aggressor, but he must have had no agency in bringing about the danger upon which he relies to justify the taking of life. Should you, after a careful examination and consideration of the facts and circumstances testified to and connected with the case, come to the conclusion that Wilson, when he killed Swayze, acted

in self-defence, then the defendant fails in making out his plea of justification, and you should find that issue for plaintiff. But if you shall find that Wilson did not act in self-defence in the killing of Swayze, then it becomes necessary for you to consider whether in the language of the plea of justification the plaintiff, Baker, encouraged, countenanced and supported Wilson in the murder of Swayze, so as to make him, Baker, accessory thereto.

In law, one becomes an accessory who is guilty of an act of felony, not by committing the offence in person, or as principal, but by advising or commanding another to commit the crime. You are therefore to determine from the testimony in the case whether Baker advised or commanded the murder of Swayze. The part of the answer setting up justification charges Baker with encouraging, countenancing, and supporting Wilson, terms of no well-defined legal signification when applied to a case such as the one before the court. I construe them to mean a legal justification, namely, the advising or commanding Wilson to murder Swayze. In trying to arrive at a conclusion as to whether Baker advised or commanded Wilson to murder Swayze, Baker is to be treated and considered by you as innocent of the crime of being accessory to the murder of Swayze by Wilson. The guilt of Baker must be shown by the defendant to your entire satisfaction, by which I here and elsewhere mean that the evidence in the case must produce an abiding conviction in your mind of the guilt of Baker.

You should with care go over all the testimony in the case, and if you find expressions used or acts done by plaintiff, Baker, fairly admitting of two meanings, you are authorized to apply the meaning leading to innocence rather than guilt. In passing from this plea of justification I sum up as follows:

First, ascertain from the correspondence complained of whether it intends to charge that Wilson murdered Swayze, and that Baker was accessory to the murder, and if you find that this is the case, you will next find whether Wilson did murder Swayze, or did the killing in self-defence. If you find that Wilson acted in self-defence, that ends the plea of justification, for there could be no murder when the killing was done in self-defence.

If you shall find that Wilson did not kill Swayze in self-defence, but committed a murder, you will next find whether Baker was accessory thereto, by advising or commanding the same. If you

shall find that Baker was not accessory to the murder, such finding will end the plea of justification in favor of plaintiff.

If you shall find that Wilson murdered Swayze, and you shall further find that Baker was accessory to the murder of Swayze, such finding establishes the plea of justification, ends the case, and you should find for defendant.

Turning from the plea of justification to the plea in mitigation pleaded by the defendant, I proceed to present the law regarding it, so that you may have the whole case before you.

The law, proceeding upon the presumption of innocence, assumes when a crime is charged upon any one that he is innocent thereof, and presumes the charge to have been maliciously made. The author or publisher is permitted, as already explained, to show that the charge made is really true, and that the person charged is or has been guilty of the crime imputed to him. Upon sustaining the charge, the one making it is acquitted and stands justified, that is if he sustain his plea of justification.

But if he fails to sustain his plea of justification, the author or publisher may show, in mitigation of damages, anything tending to establish that he acted without malice and bad intent, but from proper motives.

In cases such as the one under consideration the law will not allow the author or publisher to go free if he fails to establish his plea of justification, though he satisfy you of the purity of his motives and the greatest prudence and care in making the publication. The law requires publishers not only to be satisfied of the truth of the charges he publishes, but he must also be able to establish them to the satisfaction of a jury, in case he is sued. If the plea of justification pleaded in this case has not been made out by the defendant, it will then be necessary for you to examine into the mitigating circumstances in evidence, so as to enable you to determine the good faith, prudence and caution exercised by the defendant in making the publication, as upon this, in a large measure, must depend the amount of damages which you may assess against the defendant. You will call to mind the undisputed fact that the correspondent, Morris, was not connected with the *Kansas City Times*, and determine whether more or less care should be required at their hands when receiving a correspondence from a stranger. The manner in which the correspondence was received, the gravity of the charge and the action of the conductor of the *Times*, in refusing

or neglecting to retract the charges made in the communication, when his attention was called to it by the plaintiff, are proper for your consideration, as is also the duty which the conductor of a newspaper such as the *Times* owes to the public, as well as the legal obligation which he is under to the plaintiff. You are to guard, on the one hand, the right of plaintiff, and on the other the freedom of the press, which is measurably involved in cases of this kind. There is no claim for special damages made by plaintiff, and none has been proven. While it is your duty, in case the plea of justification has not been made out, to find damages against this defendant, the amount thereof is left to your discretion, which you will exercise with due regard to the parties.

I. The court instructed the jury that "while it is your duty, in case the plea of justification has not been made out, to find damages against the defendant, the amount thereof is left to your discretion, which you will exercise with due regard to the rights of both parties." It is submitted that the court should have laid down definite rules by which damages should have been measured. In *True v. Plumley*, 36 Maine 466, the court, at the *Nisi Prius* trial, had instructed the jury as follows: "As to damages, you will consider the pain and anguish occasioned by defendant's slander, the cost and trouble, the suffering occasioned by that slander, her prospects in life as affected thereby, the wealth and position of the defendant, and his power therefrom to injure, and give such damages as she is entitled to;" and APPLETON, J., speaking for the full Supreme Court, after reviewing the authorities in regard to the proper rules by which to assess damages in this class of cases, says: "Whatever rule may be the true one, the plaintiffs are entitled to such damages as upon the evidence can be awarded in conformity therewith, and not to damages assessed upon other erroneous principles. Now, no rule was given to the jury. Are they, then, to be a law unto themselves and, freed from all legal restraints, to assess

damages at their own will and pleasure? The jury were directed to give the plaintiffs the damages to which they were entitled. To what are the plaintiffs entitled? The question unanswered recurs. To damages which are simply compensatory, and to the full extent of any injury sustained? To those which would, by way of example, be sufficient to deter others, or to such as, beside compensating and deterring others by example, may impose a punishment on the defendant as for a crime, thus infusing into the civil proceedings the effect of a criminal procedure, and erecting the jury into a tribunal which shall in each case impose the penalty? Either of these principles might have been adopted by the jury. Which, in fact, they did adopt we know not and cannot know. As was remarked by ROGERS, J., in *Rose v. Story*, 1 Barr 190, where somewhat similar instructions were given, 'this is giving them discretionary powers without stint or limit, highly dangerous to the rights of the defendant. It is leaving them without any rule whatever.' Most of the various matters referred to in this instruction might be regarded as elements proper for the consideration of the jury; but still some rule should have been given to the jury, unless the law is that they are to determine the damages without

any restraints, and in each case according to their arbitrary discretion. * * * A new trial must therefore be granted."

An able writer, in a recent work, lays down the rule respecting the duty of the court to instruct the jury as to the rules by which they are to be governed in arriving at the damages to be given, as follows: "The amount of damages is to be determined by the jury, but the court should instruct them as to the rules by which they should be governed in fixing the amount. A general instruction to find such damages as, under all the circumstances, they thought right, was held to be improper:" Townshend on Slander and Libel, § 289. There is no possible distinction between the instructions condemned by these authorities and the one given by the court in this case. The law is clear and conclusive that some fixed rules should have been laid down for the ascertainment of damages: Sedg. Meas. Dam., 6th ed., 771.

The court should have directed the jury, even though there was no evidence of malice, to give compensatory damages, which would include the cost and trouble of disproving the libel: *Armstrong v. Pierson*, 8 Iowa 29; Townshend on Slander and Libel, § 289. The court should also have instructed the jury to give such damages as would compensate plaintiff for all the mental suffering which would naturally be caused by such a publication: Sedg. Meas. Dam. 674; *Swift v. Dickerman*, 31 Conn. 285; *Miller v. Roy*, 10 La. Ann. 231; *Dufort v. Abadie*, 23 Id. 280; *Fry v. Bennett*, 4 Duer 247. In addition to this, the court should have instructed the jury that if the publication of the article complained of was attended with circumstances of oppression, negligence or malice, they should give exemplary damages, not only to compensate the plaintiff, but to punish the offender: *Buckley v. Knapp*, 48 Mo. 152; *Clements v. Malony*, 55 Id.

352; *Snyder v. Fulton*, 34 Md. 128; *Sanderson v. Caldwell*, 45 N. Y. 398.

II. The court instructed the jury that "A party under reasonable apprehension of danger of life or great bodily harm, has a right, in self-defence, to take the life of the aggressor, but he must have had no agency in bringing about the danger upon which he relies to justify the taking of life." It is submitted that the true rule had just been stated by the court, but this proposition stood as a distinct and independent one. The principle is well settled that one person cannot attack another, and then rely upon the danger thus brought upon himself by a resistance of that attack to justify taking life: *State v. Starr*, 38 Mo. 270; *State v. Linney*, 52 Id. 40; *State v. Underwood*, 57 Id. 40; *State v. Brown*, 64 Id. 367. This principle, however, presupposes that the party bringing on the difficulty and finally taking life, has done some unlawful act, has had some criminal or unlawful agency in bringing the danger upon himself. But the instruction given in the principal case does not distinguish between lawful and unlawful agency. Wilson approached Swayze and spoke to him shortly preceding the killing. This was a lawful act. One theory was that he did this solely for the purpose of remonstrance against newspaper abuse, while another theory was that he intended to provoke Swayze to attack him and furnish a reason for homicide. In either case he had an "agency" in bringing about the danger he was placed in by Swayze's attack. The language of the court was therefore too broad, and had a tendency to mislead the jury.

III. The plea of justification was wholly insufficient. The justification must be as broad as the charge, and of the very charge: Town. Slan. and Lib., § 212; Folk. Stark. Slan. and Lib., § 692 and note 1; Id., § 694 and note 2; Id., § 701 and note 4. And where the charge is general, the plea

of justification must state the facts specifically to sustain the same, and where it is a charge of crime, the plea must specify the crime and show its commission with the same certainty as in an indictment. In other words, it is not sufficient to answer that the charge is true, but the facts which show the same to be true must be stated: *Town. Slan. and Lib.*, §§ 355 and 358; *Folk. Stark. Slan. and Lib.*, § 483 and notes 16 and 18; *Atteberry v. Powell*, 29 Mo. 429; *Smith v. Tribune Co.*, 4 Bliss 477; *Shepard v. Merrill*, 13 John. 475.

IV. The court instructed the jury that the plea of justification must be established by defendant "to your entire satisfaction, by which I here and elsewhere mean that the evidence in the case must produce an abiding conviction in your mind" of the truth of the charge, and declined to instruct that the offence charged must be proven beyond

a reasonable doubt, or with the certainty required to sustain an indictment. This is a vexed and still unsettled question in the law. The authority of the text-writers, it is submitted, is against the rule laid down in the charge: 2 Greenl. Ev., § 426; *Townshend on Slander*, § 404. In some cases, where the defence is on the ground of fraud or crime on the part of the plaintiff, as in *Scott v. Home Ins. Co.*, 1 Dillon 105, where, in an action on a policy of insurance, the defence was that plaintiff had set his own house on fire, it must be conceded that the weight of authority is in favor of the rule in civil, and not that in criminal, cases. But these authorities do not apply to a case of libel. See, however, the authorities collected and the subject ably discussed in the note to *Kane v. Hibernia Ins. Co.*, 17 Am. Law Reg. N. S. 302.

H. B. JOHNSON.

Supreme Court of Mississippi.

SCHMIDLAPP ET AL. v. S. D. CURRIE ET AL.

One partner cannot convey firm assets in satisfaction of a private debt, to the exclusion of firm creditors, without the assent of his co-partners.

He may do so, however, if the entire firm participate in the assignment. This, of course, where there is no fraud.

The lien of a firm creditor on firm assets is not superior to that of an ordinary creditor upon the property of an individual debtor.

The doctrine of the primary application of firm assets to firm debts, and individual property to individual debts, is only a principle of administration adopted by the courts when called upon to wind up the firm business, and they find no valid change or disposition of the assets has been previously made by the members; but the principle itself springs out of the obligation to do justice between the partners.

THE case is fully stated in the opinion.

The opinion of the court was delivered by

CHALMERS, J.—Harvey & Washington were partners in a liquor saloon, the former having contributed the capital and the latter his services. Harvey having become indebted to Odeneal, transferred to him, in part payment of the indebtedness, and with the knowledge

and consent of Washington, the entire business and stock of the partnership. Odeneal subsequently took in Currie as a partner, and the business was continued under the style of S. D. Currie & Co. The debt of Harvey to Odeneal, which formed the consideration of the transfer, was the individual debt of Harvey, for which neither Washington nor the firm of Harvey & Washington, as a firm, were in any way responsible; but Washington assented to and acquiesced in the sale. After the sale, Schmidlapp & Brothers, creditors of the firm of Harvey & Washington, sued out a writ of attachment against them, and caused the same to be levied on their former goods, in the possession of S. D. Currie & Co., and upon the ground that the transfer of the firm goods, in satisfaction of the individual debt of one of the partners, was fraudulent and void as against firm creditors.

Is the principle assumed a sound one? Is it true that partnership assets cannot, by the act or consent of all the partners, be assigned in liquidation of the private debt of one of the members, so as thereby to defeat the claims of firm creditors? The authorities on the question are divided, and in Burns on Fraudulent Conveyances it is broadly stated that such conveyances are voluntary and void as to firm creditors, but it is doubtful from the cases cited, whether the author is alluding to transfers made by one partner alone, without the assent of his co-partners, or whether he embraces assignments participated in by the entire firm. If the former, the proposition is indisputable. If the latter, we think the sounder reasoning and the weight of authority are against him. We speak of cases like the present, where there is no pretence of actual fraud, and where there is no showing that the firm was at the time insolvent, though, according to some of the cases, the insolvency of the firm would not affect the result. The firm creditors at large, of a partnership, have no lien on its assets, any more than ordinary creditors have upon the property of an individual debtor. The power of disposition over their property inherent in every partnership is as unlimited as that of an individual, and this *jus disponendi* in the firm, all the members co-operating, can only be controlled by the same considerations that impose a limit upon the acts of an individual owner; namely, that it shall not be used for fraudulent purposes. So long as the firm exists, therefore, its members must be at liberty to do as they choose with their own,

and even in the act of dissolution they may impress upon its assets such character as they please. The doctrine that firm assets must first be applied to the payment of firm debts, and individual property to individual debts, is only a principle of administration adopted by the courts, when from any cause they are called upon to wind up the firm business, and find that the members have made no valid disposition of, or charges upon its assets. Thus, when upon a dissolution of the firm by death, or limitation, or bankruptcy, or from any other cause, the courts are called upon to wind up the concern, they adopt and enforce the principle stated; but the principle itself springs alone out of the obligation to do justice between the partners. The only way to accomplish this is to so marshal the assets that property which was owned in common shall be applied to the joint debts, and that which was separately owned, shall be applied to the liabilities of the separate owner, so that neither class of creditors shall be allowed to trespass upon the fund belonging to the other until the claims of that other shall have been satisfied. This right of the creditors is therefore really the right of their debtors, and enures to them derivatively from the debtors. Hence, it is said the lien or *quasi* lien of the creditors "is worked out through the partners," the meaning of which is that the firm creditors may demand the primary application of the firm assets to the payment of their debts because each one of the partners would have a right to demand this as against his co-partners. It must follow, therefore, that if at a time when the firm was still in existence, where no legal liens of any sort have attached, where it was neither bankrupt nor contemplating bankruptcy, all the members have agreed to a particular disposition of its assets, and that disposition is neither colorable nor fraudulent, that is to say, is upon a bona fide consideration, and reserves no benefit to the grantees, inasmuch as none of the partners can be heard to complain of such disposition, so none of the creditors of the firm or of the individual members composing it can question or attack it.

Conceding, as all the authorities do, that the firm creditors have no independent right to demand to be first paid, but derive that right solely by, through, and under the right which the partners have to insist that this shall be done, it is impossible to see how the rule can be enforced where all the members of the firm have,

before the dissolution and without any ground to suspect fraud, given to the assets a different direction.

While some courts of high repute have taken a different view, we confess our inability to escape the logic of this proposition. The courts of New York, New Hampshire, Illinois, and perhaps other states, seem to have taken a different view of the question. In consonance with our view are the following, among other authorities : *Whitten v. Smith*, Freeman's Ch. R. 231 ; *Freeman v. Stewart*, 41 Miss. 139 ; *Carter v. Beavan*, 6 Jones' Law (N. C.) 44 ; *Rice v. Barnard*, 20 Vt. 479 ; *Nat. Bank v. Sprague*, 20 N. J. Eq. 14 ; *Allen v. Centre Valley Co.*, 21 Conn. 130 ; *Sigler v. Knox Co. Board*, 8 Ohio St. 511 ; *Ex parte Riffin*, 6 Vesey 119 ; *Campbell v. Mullett*, Swanst. Ch. 550.

Judgment affirmed.

Court of Appeals of New York.

SAMUEL BERTHOLF v. JAMES O'RIELLY.

The constitutionality of an act of the legislature is to be determined solely by its repugnancy to constitutional restraints or prohibitions. No violation of natural justice and equity is sufficient.

That a statute impairs the value of property, or interferes with its lawful use by imposing a liability for the consequences of a lawful act, does not make it unconstitutional. All property is held subject to the power of the state to regulate or control its use to secure the general safety and welfare.

It is no objection to the validity of a statute that it gives a right of action or imposes a liability unknown to the common law.

A statute making the owner of premises on which liquor is sold liable for all damages resulting from the intoxication of the persons purchasing the liquor, and this without reference to any negligence of the owner, or to the lawfulness or unlawfulness of his tenant's action, *held*, valid as a police regulation of the traffic in intoxicating liquors.

THIS was an action under a statute of April 29th 1873, commonly called the Civil Damage Act, and was brought by the plaintiff against the defendant as the landlord of hotel premises, let with knowledge that intoxicating liquors were to be sold thereon by the lessee, to recover the value of a horse owned by the plaintiff, which died in consequence of having been overdriven by the plaintiff's son while in a state of intoxication, produced in part by liquor sold him by the lessee at his bar on the leased premises. The essential facts, as established by the verdict, were as follows :

The defendant, when the act in question was passed, was the owner of a hotel building and premises. In June 1875, he leased them to one Firnhaber, knowing that the lessee intended to occupy the building for a hotel and boarding-house, and sell intoxicating liquors therein. The lessee entered into possession and opened a bar in the hotel, and with the defendant's knowledge commenced selling liquors therefrom. On Sunday, July 18th 1875, the plaintiff's son, who was residing with his father, informed him that he had some business with a person residing about four miles from the father's residence, and thereupon, with the plaintiff's knowledge, took his horse and buggy and drove away.

He did not go to the place where he informed the plaintiff he intended to go, but went to the village where Firnhaber's hotel was located, and to the hotel, and there purchased and drank whiskey several times at the bar, and then drove to a neighboring village and drank again, and returned to Firnhaber's, drinking again on his return. He became, in consequence of these repeated potations, intoxicated, was arrested for disorderly conduct in the streets, and after being detained in custody for a time was discharged, and in the evening started for home, and the horse, soon after it reached the plaintiff's house, died. The jury found that it died from overdriving by the plaintiff's son, and that his treatment of the horse was caused by his intoxication.

Firnhaber had no license to sell intoxicating liquors. It was understood between him and the defendant, when the lease was made, that a license was to be procured, and the defendant informed him that he would see that he had one. The plaintiff's son was of intemperate habits, and at one time had been an inmate of an inebriate asylum. The plaintiff recovered a verdict for the value of the horse.

William J. Gros, for the plaintiff.

Lewis E. Carr, for defendant.

The opinion of the court was delivered by

ANDREWS, J.—This and other cases which have been argued and are awaiting the decision of the court, present the question of the constitutionality of the "act to suppress intemperance, pauperism and crime," passed April 29th 1873, commonly known as the Civil Damage Act.

It cannot be disputed that the facts found bring the case within the terms of the statute, and authorize the recovery, if the law itself is valid.

The act gives to every husband, wife, parent, guardian, employer or other person "who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication" of any person, a right of action against any person who shall, by selling or giving away intoxicating liquors, have caused the intoxication, in whole or in part; and declares that "any person or persons owning or renting, or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold thereon, shall be liable, severally and jointly with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages."

All the elements of the landlord's liability under the act exist in this case, viz: The leasing of premises with knowledge that intoxicating liquors were to be sold thereon; the sale by the tenant producing intoxication; and the act of the intoxicated person causing injury to the property of the plaintiff.

The question we are now to determine is, whether the legislature has the power to create a cause of action for damages in favor of a person injured in person or property by the act of an intoxicated person, against the owner of real property, whose only connection with the injury is that he leased the premises where the liquor causing the intoxication was sold or given away, with knowledge that intoxicating liquors were to be sold thereon.

To realize the force of this inquiry it is to be observed that the leasing of premises for the sale of liquors thereon is a lawful act, not prohibited by this or any other statute. The liability of the landlord is not made to depend upon the nature of the act of the tenant, but exists irrespective of the fact whether the sale or giving away of the liquor was lawful or unlawful; that is, whether it was authorized by the license law of the state, or was made in violation of that law. Nor does the liability depend upon any question of negligence of the landlord in the selection of the tenant, or of the tenant in selling liquor. Although the person to whom the liquor is sold is at the time apparently a man of sober habits, and, so far as the vendor knows, one whose appetite for strong drink is habitually controlled by his reason and judgment, yet if it turns out

that the liquor causes or contributes to the intoxication of the person to whom the sale or gift is made, under the influence of which he commits an injury to person or property, the seller and his landlord are by the act made jointly and severally responsible. The element of care or diligence on the part of the seller or landlord does not enter into the question of liability. The statute imposes upon the dealer and the landlord the risk of any injury which may be caused by the traffic. It cannot be denied that the liability sought to be imposed by the act is of a very sweeping character, and may, in many cases, entail severe pecuniary liabilities, and its language may include cases not within the real purpose of the enactment. The owner of a building who lets it to be occupied for the sale of general merchandise, including wines and liquors, may, under the act, be made liable for the acts of an intoxicated person, where his only fault is that he leased the premises for a general business, including the sale of intoxicating liquors, in the same way as other merchandise. The liability is not restricted to the results of intoxication from liquors sold or given away to be drunk on the premises of the seller.

There is no way by which the owner of real property can escape possible liability for the results of intoxication where he leases or permits the occupation of his premises, with the knowledge that the business of the sale of liquors is to be carried on on the premises, whether alone or in connection with other merchandise, or whether they are to be sold to be drunk on the premises or to be carried away and used elsewhere.

His only absolute protection against the liability imposed by the act is to be found in not using or permitting the premises to be used for the sale of intoxicating liquors.

The question whether the act under consideration is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions. The legislative power has no other limitation. If an act can stand when brought to the test of the constitution, the question of its validity is at an end, and neither the executive nor judicial department of the government can refuse to recognise or enforce it. The theory that laws may be declared void when deemed to be opposed to natural justice and equity, and although they do not violate any constitutional provision, has some support in the dicta of learned judges, but has not been approved. so far as we know, by any authoritative

adjudication, and is repudiated by numerous authorities. Indeed, under the broad and liberal interpretation now given to constitutional guaranties, there can be no violation of fundamental rights by legislation which will not fall within the express or implied prohibition and restraints of the constitution; and it is unnecessary to seek for principles outside of the constitution under which such legislation may be condemned.

The main guaranty of private rights against unjust legislation is found in that memorable clause in the Bill of Rights, that no person shall "be deprived of life, liberty or property without due process of law." Const., art. 1, sect. 6. This guaranty is not construed in any narrow or technical sense. The right to life may be invaded without its destruction. One may be deprived of his liberty in a constitutional sense without putting his person in confinement; and property may be taken without manual interference therewith, or its physical destruction.

The right to life includes the right of the individual to his body in its completeness and without dismemberment; the right to liberty, the right to exercise his faculties, and to follow a lawful vocation for the support of life; the right of property, the right to acquire, possess and enjoy it in any way consistent with the equal rights of others, and the just exactions and demands of the state.

The comprehensive scope of the guaranty of private property finds many illustrations in the judicial decisions in our state. The limit placed upon the power of taxation is an instance. The right of taxation is an attribute of sovereignty, without which governments would be powerless, and organized society could not exist, and it is said to be unlimited. But this is only true when it is exercised for a public purpose. The taking of private property for a private purpose, under the guise of taxation, is no less a violation of the constitution than if the property of A. was attempted to be transferred to B. by the mere force of a legislative mandate.

It is upon this principle that we have recently held in the case of *Weismer v. The Village of Douglass*, 64 N. Y. 92, that a law involving taxation in aid of a private enterprise and business was unconstitutional and void.

In *Wynehamer v. The People*, 13 N. Y. 378, the sanctity of private property, and the efficiency of constitutional guaranties for its protection, under whatever guise it is attempted to be assailed by legislation, was most ably and amply vindicated. The pro-

visions in the act then under consideration were held to deprive persons owning intoxicating liquors at the time of its passage, of their property, although their title might not be affected by the act, or the property itself, in its material substance, taken or destroyed. "There may," says MILLER, J., in *Pumpelly v. The Green Bay Co.*, 13 Wall. 177, "be such serious interruption to the common and necessary use of property as will be equivalent to a taking, within the meaning of the constitution;" and this observation is warranted by the general tenor of judicial authority.

Admitting, as we do, the soundness of this interpretation, and fully approving it, we come back to the proposition that no law can be pronounced invalid, for the reason simply that it violates our notions of justice, is oppressive and unfair in its operation, or because, in the opinion of some or all of the citizens of the state, it is not justified by public necessity, or designed to promote the public welfare. We repeat, if it violates no constitutional provision, it is valid and must be obeyed. The remedy for unjust or unwise legislation, not obnoxious to constitutional objections, is to be found in a change by the people of their representatives, according to the methods provided by the constitution.

There are two general grounds upon which the act in question is claimed to be unconstitutional: First. That it operates to restrain the lawful use of real property by the owner, inasmuch as it attaches to the particular use a liability, which substantially amounts to a prohibition of such use, and, as to the seller, imposes a pecuniary responsibility, which interferes with the traffic in intoxicating liquors, although the business is authorized by law. And, second. That it creates a right of action unknown to the common law, and subjects the property of one person to be taken in satisfaction of injuries suffered by another, remotely resulting from an act of the person charged, which act is neither negligent nor wrongful on his part, but which may be in all respects in conformity with law. The act, it is said, in effect authorizes the taking of private property without "due process of law," contrary to article one, section six, of the constitution, and is also a violation of the first section of the same article, which declares that "no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any of the citizens thereof, unless by the law of the land or the judgment of his peers." If the act is "due process of law," within the sixth section of the first

article, it is manifest that it is valid within the other section to which reference is made.

The right of the state to regulate the traffic in intoxicating liquors within its limits has been exercised from the foundation of the government, and is not open to question. The state may prescribe the persons by whom and the conditions upon which the traffic may be carried on. It may impose upon those who act under its license such liabilities and penalties as in its judgment are proper to secure society against the dangers of the traffic, and individuals against injuries committed by intoxicated persons under the influence of or resulting from their intoxication.

The licensee, by accepting a license, and acquiring thereby a privilege from the state to engage in the traffic, a privilege confined to those who are licensees, and withheld from all other citizens, takes it subject to any conditions which the legislature may attach to its exercise. He consents to be bound by the conditions when he accepts the license; and the state is the sole judge of the reasonableness of the conditions imposed. And the power of the legislature, as a part of the excise system, to impose the liabilities imposed by the act in question, upon licensed dealers, as a condition of granting the license, cannot, we think, be questioned.

A party cannot object, upon constitutional grounds, to a liability which he has voluntarily assumed in consideration of a benefit conferred; and one may renounce even a constitutional provision made for his own benefit. The extent to which the legislature has heretofore gone in imposing restrictions or liabilities upon licensees may be seen by reference to the Excise Law of 1857 (chap. 628), many provisions of which are to be found in earlier legislation. Section ten prohibits the sale of liquor on credit to any person other than lodgers, and avoids all securities taken therefor. Section nineteen gives a penalty of fifty dollars to a wife against a dealer in intoxicating liquors, who shall sell or give intoxicating liquor to a husband after complaint made and notice given, as provided by the section, and a like penalty is given under similar circumstances for selling or giving away intoxicating liquors to a wife or minor child. Section twenty-eight contains the germ of the act now under consideration. It provides that any person who shall sell strong or spirituous liquors to any of the individuals to whom it is declared by the act unlawful to make such sales, "shall be liable for all damages which may be sustained in consequence

of such sale," to be recovered by the party sustaining the injury, or by the overseer of the poor for his benefit.

The act of 1873 cannot, however, be sustained, in all its aspects at least, upon the theory that the liability imposed by the act is a condition of a privilege granted by the state. This cannot be affirmed in respect to the liability of the landlord, whose right to lease his property belongs to him as an incident of ownership. The responsibility imposed is not confined to cases of unlawful sales of liquor, or to sales made by licensed vendors. Any person selling or giving away liquor, which causes intoxication and consequent injury, is made liable under the act.

The broad question is presented, whether the act transcends the limits of legislative power in subjecting a landlord to liability, under the circumstances mentioned in the act. Does the act, in effect, deprive him of his property without "due process of law," in the sense of the constitution? If the act can be sustained as to the landlord, it is clearly valid as to all other persons; and its validity as to the landlord is the question directly presented in this case.

We need not enter into any elaborate discussion of the meaning of the words "due process of law." This has been done in numerous judicial decisions. They are held, under the liberal interpretation given them, to protect the life, liberty and property of the citizen against acts of mere arbitrary persons, in any department of the government. DENIO, J., in *Westervelt v. Gregg*, 12 N. Y. 212. These are the fundamental civil rights, for the security of which society is organized; and all acts of legislation which contravene them are within the prohibition of the constitutional guaranty. In judicial proceedings, "due process of law" requires notice, hearing and judgment; in legislative proceedings, conformity to the settled maxims of free governments, observance of constitutional restraints and requirements, and an omission to exercise powers appertaining to the judicial or executive departments. It is as difficult as it would be unwise, to attempt an exact definition of their scope. Their application, in a particular case, must be determined when the question arises, and, in the absence of exact precedents courts must determine the question upon a consideration of the general scope of legislative power, the practice of governments, and in view of the conceded principle that individual rights

may be curtailed and limited to secure the public welfare and the equal rights of all.

"Due process of law," in each particular case, means, says Judge COOLEY, "such an exertion of the powers of government as the settled maxims of the law sanction, and under safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

The right of life, liberty or property is not absolute or uncontrollable. The qualification in the Bill of Rights implies that the deprivation of those rights may be due process of law; and governments could not be maintained, in the absence of power somewhere to regulate the relations of individuals to the state, and to each other. Life, liberty or property may be forfeited for cause. Private property may be taken for public use, on condition of compensation, or by taxation, or it may be transferred by judicial process, for the satisfaction of private contracts or as a compensation for private wrongs and injuries.

The purpose of the act in question, as indicated by its title, is the suppression of "intemperance, pauperism and crime." It cannot be denied that these are public purposes within the legitimate scope of legislation, nor can it be doubted by any observing and intelligent person that the use of intoxicating liquors is the fruitful source of many of the evils which afflict society. Pauperism, vice and crime are the usual concomitants of the unrestrained indulgence of the appetite for strong drink. Impoverishment of families, the imposition of public burdens, insecurity of life and property, are consequent upon the prevalence of the great evil of intemperance. If the legislature was impotent to deal with the traffic in intoxicating liquors, or powerless to restrain or regulate it in the interest of the community at large, because legislation on the subject might, to some extent, interfere with the use of property or the prosecution of private business, the legislature would be shorn of one of its most usual and important functions. But, as we have said, the right of the legislature to regulate the traffic is shown by the uniform practice of the government. It may not only regulate, but it may prohibit it. This was declared, after solemn argument and mature deliberation, in one of the propositions adopted by this court in *Wynehamer v. The People*, subject only to qualification that the prohibition shall not interfere with vested rights of property. The same principle was declared in the case of *The*

Metropolitan Board of Health v. Barrie, 34 N. Y. 657 ; and that the legislative power extends to the entire prohibition of the traffic has been recently adjudged by the Supreme Court of the United States.

It is quite evident that the Act of 1873 seriously interferes with the profitable use of real property by the owner. This is especially true with respect to a building erected to be occupied as an inn or hotel, and specially adapted to that use, where the rental value may largely depend upon the right of the tenant to sell intoxicating liquors. The owner of such a building may well hesitate to lease his property, when by so doing he subjects himself to the onerous liability imposed by the act. The act, in this way, indirectly operates to restrain the absolute freedom of the owner in the use of his property, and may justly be said to impair its value. But this is not a taking of his property within the meaning of the constitution. He is not deprived either of the title or the possession. The use of his property for any other lawful purpose is unrestricted, and he may let or use it as a place for the sale of liquors, subject to the liability which the act imposes.

The objection we are now considering would apply with greater force to a statute prohibiting, under any circumstances, the traffic in intoxicating liquors, and as such a statute must be conceded to be within the legislative power, and would not interfere with any vested rights of the owner of real property, protected by the constitution, although absolutely preventing the particular use, *a fortiori*, the act in question does not operate as an unlawful restraint upon the use of property.

That a statute impairs the value of property does not make it unconstitutional. All property is held subject to the power of the state to regulate or control its use, to secure the general safety and the public welfare. "We think it a settled principle," says Chief Justice SHAW, in *Commonwealth v. Alger*, 7 Cush. 84, "growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property is held subject to those general regulations which are necessary to the common good and general welfare." Judge REDFIELD, in a passage often cited with approval, speaking of

the police power, says: "By this general police power of the state persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the state; of the perfect right of the legislature to do which no question ever was or upon acknowledged general principles can be made:" *Thorpe v. Rut. & Burl. Railroad Co.*, 27 Vt. 140. The police power, so called, inheres in every sovereignty, and is essential to the maintenance of public order and the preservation of mutual rights from the disturbing conflicts which, in the absence of any controlling, regulating authority, and has been constantly exercised by the legislature in a great variety of cases. We need not enumerate the subjects in relation to which this power has been exercised. We shall content ourselves by referring to two cases, recently decided by the Supreme Court of the United States, to show how far courts have gone in upholding legislation affecting private rights and property, as a due exercise of the police power residing in the state. These cases are *The Slaughter-House Cases*, 16 Wall. 36, and *Munn v. The State of Illinois*, 4 Otto 114. The first case involved the question of the validity of a statute of Louisiana, passed in 1869, granting to a corporation, created by the act, the exclusive right for twenty-five years to have and maintain slaughter-houses, landings for cattle, and yards for enclosing cattle intended for sale or slaughter, within the parishes of Orleans, Jefferson and St. Bernard, a territory containing over a thousand square miles, including the city of New Orleans and a population of several hundred thousand persons, and prohibiting all other persons from building, keeping or having slaughter-houses, landings or yards for cattle intended for sale or slaughter, within these limits; and requiring that all cattle and other animals, intended for sale or slaughter within that district, should be brought to the yards and slaughter-houses of the corporation; and, authorizing the corporation to exact certain fees for the use of its wharves, and for each animal slaughtered. It appeared that when the act was passed there were within this territory a thousand or more persons engaged in the preparation and sale of animal food, many of whom owned slaughter-houses and yards for the prosecution of their business. The act was entitled "An act to protect the public health," &c., and the court held it valid as a police regulation. That the act seriously interfered with the prosecution of a lawful business by a large number of people and greatly impaired the value of slaughter-

house property is evident. But the majority of the court were of the opinion that the act was not void, either as creating a monopoly, or as depriving the persons affected by it of their property, within the meaning of the constitution.

In *Munn v. The State of Illinois*, the court sustained an act of the legislature of Illinois prescribing a maximum rate of charges for the handling of grain, in warehouses in that state, and requiring warehouses to procure a license, and authorizing its revocation, and prohibiting the carrying on the business of warehousing grain, in any warehouse, without such license, or after its revocation. The act was held to be valid as well as to warehouses built before as to those which might be built after the act was passed. The right of the state to make the regulations contained in the acts was put upon the ground that the subject was one involving the public interest and general welfare. WAITE, Ch. J., in delivering the opinion of the court, said: "When one devotes his property to a use in which the public have an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

These cases may perhaps be deemed to have carried the right of legislative interference with private rights and property to its utmost limit, but they illustrate the scope of the police power in legislation; and the reports abound in decisions which show that the state has authority to regulate the use and enjoyment of property and the control of private business in many ways, "without coming in conflict with any of those constitutional principles which are established for the protection of private rights or private property."

The right of the legislature to control the use and traffic in intoxicating liquors being established, its authority to impose liabilities upon those who exercise the traffic, or who sell or give away intoxicating drinks, for consequential injuries to third persons, follow as a necessary incident; and the Act of 1873 is not invalid, because it creates a right of action and imposes a liability not known to the common law. There is no such limit to legislative power. The legislature may alter or repeal the common law. It may create new offences, enlarge the scope of civil remedies, and fasten responsibility for injuries upon persons against whom the common law gives no remedy. We do not mean that the legisla-

ture may impose upon one man liability for an injury suffered by another with which he had no connection. But it may change the rule of the common law, which looks only to the proximate cause of the mischief, in attaching legal responsibility, and allow a recovery to be had against those whose acts contributed, although remotely, to produce it. This is what the legislature has done in the Act of 1873. That there is or may be a relation, in the nature of cause and effect, between the act of selling or giving away intoxicating liquors, and the injuries for which a remedy is given, is apparent; and upon this relation the legislature has proceeded in enacting the law in question. It is an extension of the principle expressed in the maxim, "*sic utere tuo, ut alienum non lædas,*" to cases to which it had not before been applied; and the propriety of such an application is a legislative and not a judicial question.

It is said that the statute imposes a liability for the consequences of a lawful act. But the legislature, having control of the subject of the traffic and use of intoxicating liquors, may make such regulations to prevent the public evils and private injuries resulting from intoxication as in its judgment are calculated to accomplish this end. It may prohibit the selling or giving away of liquor, or it may, while not interfering with the liberty of sale or use, guard against the dangers of an indiscriminate traffic, and induce caution on the part of those who engage in the business, by subjecting them to liabilities for consequential injuries.

The Act of 1873 does not deprive the seller, who is made liable under the act, of his property, without due process of law. It authorizes it to be appropriated, in the due course of judicial proceedings, for the satisfaction of injuries resulting from intoxication caused by his act. The legislatures have said that the seller may be treated as the author of the injuries, and we think this was within the legislative powers.

The liability imposed upon the landlord for the acts of the tenant is not a new principle in legislation. His liability only arises when he has consented that the premises may be used as a place for the sale of liquors. He selects the tenant, and he may, without violating any constitutional provision, be made responsible for the tenant's acts committed with the use of the leased property.

In *Dobbins v. U. S.*, 6 Otto 395, a distillery had been seized and condemned to be forfeited for the violation by the lessee of certain provisions of the Act of Congress regulating the business of distilling.

No fraud was imputed to the owner of the premises, and he was not charged with any complicity with the tenant in violating the law. The owner objected that his property could not be forfeited for the acts of the tenant, committed without his knowledge or consent. But the court affirmed the decree of condemnation, and, in his opinion, CLIFFORD, J., says: "The legal conclusion must be that the unlawful acts of the distiller bind the owner of the property in respect to the management of the same as much as if they were committed by the owner himself. Power to that effect the law invests in him by virtue of his lease, and if he abuses his trust it is a matter to be settled between him and his lessor; but the acts of violation, as to the general consequences to the property, are to be considered just the same as if they were the acts of the owner."

Our conclusion is that the Act of 1873 is a constitutional enactment. It is doubtless an extreme exercise of legislative power, but we cannot say that it violates any express or implied prohibition of the constitution.

The judgment must be affirmed with costs.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF ERRORS OF CONNECTICUT.²

SUPREME COURT OF ILLINOIS.³

SUPREME COURT OF MISSOURI.⁴

SUPREME COURT OF NEW JERSEY.⁵

SUPREME COURT OF OHIO.⁶

SUPREME COURT OF WISCONSIN.⁷

ARREST. See *Escape*.

ASSIGNMENT.

Claim against the United States.—An assignment of a claim against the United States, made before the claim has been allowed, and before

¹ Prepared expressly for the American Law Register, from the original opinions filed during October Term 1878. The cases will probably be reported in 7 or 8 Otto.

² From John Hooker, Esq., Reporter; to appear in 45 Connecticut Reports.

³ From Hon. N. L. Freeman, Reporter; to appear in 87 Illinois Reports.

⁴ From T. K. Skinker, Esq., Reporter; to appear in 67 Missouri Reports.

⁵ From G. D. W. Vroom, Esq., Reporter; to appear in vol. 11 of his Reports.

⁶ From E. L. DeWitt, Esq., Reporter; to appear in 34 Ohio St. Reports.

⁷ From Hon. O. M. Conover, Reporter; to appear in 45 Wisconsin Reports.

a warrant has been issued for its payment, has no validity, either in law or in equity: *Spofford v. Kirk et al.*, S. C. U. S. Oct. Term 1878.

ASSUMPSIT.

For value of excess of Land named in Deed.—Where a tract of land was sold as containing 140 acres, at a given sum per acre, and a deed made conveying the same, and the purchaser gave his note secured by deed of trust for the unpaid price, it being verbally agreed, before the execution of the writings, that if the land on a survey should contain more than 140 acres, the purchaser should pay for such excess, and if it fell short, the seller should pay for the deficit at the same price per acre for which the land was sold, it was held, that a recovery could be had for any excess in the number of acres in the land, and that parol evidence of the contract was admissible: *Ludeke v. Sutherland*, 87 Ill.

ATTORNEY. See *Witness*.

BAILMENT.

Symbolical Delivery.—The delivery by a purchaser of grain to his vendor at the time of the shipment, of the railroad receipts as a security for the payment of the purchase-money, is a symbolical delivery of the grain as a pledge, and vests in the pledgee a special property entitling him to the proceeds of the grain to the amount of his debt: *Taylor v. Turner*, 87 Ills.

BANKRUPTCY.

Power of District Courts—Summary Order of Sale.—District courts, though constituted courts of bankruptcy, do not possess the power, under the twenty-fifth section of the Bankrupt Act, to order in a summary way the sale of an estate, real or personal, although the same is claimed by the assignee, even though the title to the same is in dispute, if it also appears that the estate in question is in the actual possession of a third person, holding the same as owner, and claiming absolute title to and dominion over the same as his own property, whether derived from the debtor before he was adjudged bankrupt or from some former owner: *Gifford et al. v. Helmes*, S. C. U. S., Oct. Term 1878.

Courts of bankruptcy may exercise many of the powers conferred by the first section of the Bankrupt Act in a summary way, as well in vacation as in term time, first giving notice to the party opposed in interest to the prayer of the petition, as in a rule to show cause in an action at law or in a suit in equity without service of process, the rule being that in such a proceeding neither party is entitled to a trial by jury, and that the only remedy for error is to seek a review under the first clause of the second section of the same act: *Id.*

Power to revise cases and questions which arise in the district courts in such proceedings is conferred upon the circuit courts by that clause of section 2, but it is settled law that the power so conferred does not extend to any case where special provision for the revision of the case is otherwise made: *Id.*

Creditors cannot sue, but must bring suit in name of Assignee.—Under the Bankrupt Act, creditors can have no remedy which will reach property fraudulently conveyed, except through the assignee, for two reasons: (1.) Because all such property, by the express words of the

Bankrupt Act, vests in the assignee by virtue of the adjudication in bankruptcy and of his appointment. (2.) Because they cannot sustain any suit against the bankrupt: *Glenny v. Langdon*, S. C. U. S., Oct. Term 1878.

Prima facie the bankrupt is divested of the whole estate, nor have the creditors any right to sue; but if it be represented that the assignee will not sue, the court having original jurisdiction of the matter may direct the recusant assignee to proceed, or may give the bankrupt or a creditor the right to institute the suit in the name of the assignee, first indemnifying the assignee against costs: *Id.*

BILLS AND NOTES.

Demand of Payment—Diligence—Holder not prejudiced by Mistake of Postmaster.—The holder of a note, payable in a distant city, sent it by mail, for collection, to a bank in that city, in ample time to reach its destination, by ordinary course of mail, before maturity. When the letter containing the note reached the city, the bank had made an assignment, and the address of the holder being printed on the envelope, the postmaster at once returned it, with the endorsement "bank failed." The holder, on the day of its reception, again mailed it to another agent in said city, who caused it to be presented and protested for non-payment on the day it was received, but several days after maturity: *Held*, that the holder had used due diligence in making demand of payment; that he was not required to make provision for a possible but unanticipated suspension of the bank before arrival of the letter, nor for the unauthorized interference with the same by the public officer in charge of the mails: *Pier v. Heinrichshoffen*, 67 Mo.

A notary's certificate of protest, which states that he put into the proper post-office the notice of presentment, demand, refusal and protest, is sufficient without the further statement by him that he prepaid the postage on such notice. So, the word "mailed," as applied to a letter, implies that the letter was properly prepared for transmission, and was put in the custody of the officer charged with the duty of forwarding the mail: *Id.*

Transfer by Endorsement—Subsequent Title.—Where a negotiable promissory note is transferred by endorsement, after maturity, the legal title is thereby vested in the endorsee; and, after such endorsement, the amount due on the note can not be garnished in the hands of the maker, whether he has notice of the transfer or not, as a debt due to the original holder: *Knisely v. Evans*, 34 Ohio St.

Endorsement—Intent.—The defendant, a holder of a negotiable note payable in five years from date with interest, endorsed by the payee in blank, delivered it before maturity to the plaintiff, with his name endorsed on it under that of the payee, but with the following words in his own writing above his name: "Rec'd one year's interest on the within. May 10, 1871." *Held*, that the whole entry taken together imported merely the acknowledgment of the payment of interest on the note, and that if the plaintiff would show that the defendant had made himself an endorser of the note by his signature, he must show by evidence *aliunde* that the signature had no connection with the words written above it: *Clark v. Whiting*, 45 Conn.

CHATTEL MORTGAGE. See *Debtor and Creditor*.

COLLATERAL SECURITY. See *Bailment*.

COMMON CARRIER.

Delay—Damages.—If a common carrier is chargeable with knowledge that the article carried is intended for market, and unreasonably delays its delivery, and there is a depreciation in the market value of the article at the place of consignment, between the time it ought to have been delivered, and the time it was in fact delivered, such depreciation will, ordinarily, constitute the measure of damages: *Devereux v. Buckley*, 34 Ohio St.

CONFEDERATE STATES.

Status of Residents in, during the Civil War—Invalidity of Legislation of the Confederate Congress—Liability of Person executing Military Orders of the Confederate Army.—On the 6th of March 1862, the Confederate Congress passed an act declaring it to be the duty of all military commanders in the service of the Confederate States to destroy all cotton, tobacco, and other property that might be useful to the forces of the United States, whenever, in their judgment, the same should be about to fall into their hands. Afterwards, on the 2d of May 1862, General Beauregard, commanding the Confederate forces, in obedience to that act, made and issued a general order, directed to officers under his command in the state of Mississippi, to burn all cotton along the Mississippi river likely to fall into the hands of the forces of the United States. In pursuance of this order S. was commanded by the provost-marshal to burn certain cotton, including the cotton of F., which was near the bank of the Mississippi and likely to fall into the hands of the Federal forces. In an action for damages brought by F. against S.: *Held*, that the destruction of the cotton, under the orders of the rebel military authorities, for the purpose of preventing it from falling into the hands of the Federal army, was an act of war upon the part of the military forces of the rebellion, for which the person executing such military orders was relieved from civil responsibility at the suit of the owner voluntarily residing, at the time, within the lines of the insurrection: *Ford v. Surget*, S. C. U. S., Oct. Term 1878.

The district of country declared by the constituted authorities during the late civil war, to be in insurrection against the government of the United States was enemy territory, and all the people residing within such district were, according to public law, and for all purposes connected with the prosecution of the war, liable to be treated as enemies, without reference to their personal sentiments and dispositions: *Id.*

There was no legislation of the Confederate Congress which this court can recognise as having any validity against the United States, or against any of its citizens, who, pending the war, resided outside of the defined limits of the insurrectionary districts: *Id.*

The Confederate government can be regarded by the courts in no other light than as simply the military representative of the insurrection against the authority of the United States: *Id.*

To the Confederate army was, however, conceded, in the interest of humanity and to prevent the cruelties of reprisals and retaliation, such

belligerent rights as belonged, under the laws of nations, to the armies of independent governments engaged in war against each other, that concession placing the soldiers and officers of the rebel army, as to all matters directly connected with the mode of prosecuting the war, on the footing of those engaged in lawful war, and exempting them from liability for acts of legitimate warfare : *Id.*

CONFLICT OF LAWS. See *Receiver*.

CONSTITUTIONAL LAW. See *Criminal Law*.

Construction should follow Intent.—Courts are not justified in giving a strained construction or astute interpretation to a constitutional provision to avoid the intention of the framers of the instrument, or of a statute passed under it to carry out its mandate, in order to relieve against individual or local hardships. Their duty is to enforce them according to their plain and obvious meaning : *Law v. The People*, 87 Ill.

COURTS.

Jurisdiction.—Where a declaration in assumpsit set up in different counts separate demands, each of which was below the jurisdiction of the court, it was held that the court had no jurisdiction, although the different demands in the aggregate were of sufficient amount, and although the damages claimed were within the jurisdiction : *Camp v. Stevens*, 45 Conn.

After judgment had been rendered for the plaintiff in the case, the defendant at the same term of the court moved that the case be stricken from the docket for want of jurisdiction. *Held*, that the motion was not too late, and that the case might properly be stricken from the docket : *Id.*

CRIMINAL LAW. See *Witness*.

Cumulative Sentences.—Where a prisoner is convicted, on the same day, under two distinct indictments, and is separately sentenced under each to a term of imprisonment in the penitentiary, the terms are not concurrent, but one commences when the other ends, and the prisoner is not entitled to be discharged until both have expired : *Williamson's Case*, 67 Mo.

Evidence—Variance—Name.—Upon the trial of a person jointly indicted with another, the prosecution will not be permitted to show that the latter is in the penitentiary of another state : *The State v. English*, 67 Mo.

When the prosecution has given evidence tending to prove that the defendant went to the place where the crime was committed for the purpose of committing it, the defendant will be allowed to show that he went thither on legitimate business : *Id.*

Evidence that the defendant stole property of Peter Sinish will not sustain an indictment for stealing property of John Peter Sinish : *Id.*

Accessory.—Mere concealment of a murder, committed within his knowledge, does not make a man an accessory, at common law, but is a misprison of felony : *State v. Hann*, 11 Vroom.

Prosecution without a Finding by Grand Jury.—A statute authoriz-

ing the prosecution of the offence of keeping a disorderly house by a city court, without an indictment found by a grand jury, is repugnant to a constitutional provision that "no person shall be held to answer for a criminal offence unless on the presentment of a grand jury," &c. : *State v. Anderson*, 11 Vroom.

Not so a statute authorizing a prosecution for the sale of ardent spirits without a license : *Id.*

DAMAGES. See *Common Carrier*.

DEBTOR AND CREDITOR. See *Partnership*.

Chattel Mortgage—Mortgagor remaining in Possession—Fraud.—While it is the settled law of this state, that an agreement in, or contemporaneous with, a chattel mortgage, that the mortgagor may remain in possession, sell the goods, and apply a part of the proceeds to his own use, renders the instrument void as against creditors, (*Blakeslee v. Rossman*, 43 Wis. 116); yet the mere fact of leaving a stock of goods in the mortgagor's possession, with instructions to go on and sell as usual, and make remittances to the mortgagee, though proper evidence to go the jury, in connection with other facts, upon the question of fraudulent intent, does not of itself amount to fraud : *Fisk v. Harshaw*, 45 Wis.

DECEDENTS. See *Probate Courts*.

EQUITY. See *Fraud ; Judgment*.

Account—Partnership—Reform of written Instrument.—Except in an action of account, which is almost obsolete, it is a general rule that, between partners, whether they are so in general or for a particular transaction only, no account can be taken at law : *Ivinson v. Hutton*, S. C. U. S., Oct. Term 1878.

Owing to the ability of courts of equity, not only to investigate complicated accounts, but also to compel the specific performance of agreements, and to reform or rescind the same, in case of fraud or mistake, and to restrain breaches of duty for the future, it is to them, rather than courts of law, that partners usually have recourse for the settlement of controversies among themselves : *Id.*

Courts of equity possess the power to correct mistakes in written instruments, even to the extent of changing the most material stipulations they contain, and which are the subjects of special agreement; but the settled rule of practice is that the power should always be exercised with great caution, and only in cases where the proof is entirely satisfactory : *Id.*

Where an instrument is drawn and executed which professes or is intended to carry a prior agreement into execution, whether in writing or by parol, which by mistake violates or fails to fulfil the manifest intention of the parties, equity, if the proof is clear, will correct the mistake so as to produce a conformity of the written instrument to the antecedent agreement of the parties : *Id.*

Facts to be determined by the Court—Office of Jury only advisory.—In all equitable actions, even where questions of facts are submitted to a jury by the judge (on his own motion or by request of a party), the court must find that all the facts necessary to sustain the judgment have

been established by the evidence, and order the judgment: *Stahl v. Gotzenberger*, 45 Wis.

Issues of fact submitted to a jury in an equitable action should be *particular* issues, fixed and agreed upon before the jury is called. And if the court is not satisfied with the findings of the jury, it may submit the same issues to another jury, or may itself determine them: *Id.*

ESCAPE.

Arrest—Escape and Retaking—Option of Creditor—Election by Conduct.—It is not necessary that there should be a manual touching of the body, or actual force used to constitute an arrest in a civil action; it is sufficient if the party be within the power of the officer and submits to the arrest: *Richardson, Executor of Esther T. Browning, v. Rittenhouse*, 11 Vroom.

It is an escape, if the sheriff, after arrest on execution, permits the defendant to remain at home, on the promise to go the same day, with his surety, to the sheriff's office to give bail for his appearance: *Id.*

If the defendant, after escape, surrenders himself to the sheriff, the plaintiff has his election, either to bring his action against the sheriff for the escape, or to affirm the defendant in custody under his writ: *Id.*

Where the defendant, being in actual custody of the sheriff, gives a bond and inventory under section two of the insolvent laws, and applies to the court for the benefit of said laws, if the plaintiff, *having knowledge of the escape*, appears in court as a creditor and opposes the debtor's discharge, and he is thereupon remanded and surrenders himself into the custody of the sheriff, the election is made, and the action for escape is waived: *Id.*

EVIDENCE. See *Criminal Law*; *Verdict*.

Rule as to amount of in Civil Suits for Criminal Acts.—In an action for damages resulting from the sales of intoxicating liquor, under the seventh section of the statute on that subject (67 Ohio L. 102), it is not necessary that the illegal sales should be proved beyond a reasonable doubt: *Lyon v. Fleahmann*, 34 Ohio St.

EXECUTION.

Promise to indemnify Officer—Statute of Frauds.—A verbal promise, by a judgment creditor, to indemnify an officer holding an execution against loss or damage from the seizure and sale of property claimed by the debtor to be exempt from execution, is not void as being against public policy; nor is such promise within the Statute of Frauds: *Mays v. Joseph*, 34 Ohio St.

EXECUTOR AND ADMINISTRATOR. See *Probate Courts*.

FORMER ADJUDICATION.

Order for Examination of Debtor in aid of Execution—Extent of Adjudication.—Where a judgment creditor has obtained an order for the examination of the defendant in the judgment, on supplementary proceedings, and the order has been fully executed, and the proceeding heard upon its merits and dismissed, the case is *res judicata*; the parties are precluded as to all matters existing previous to that time, and which were embraced in the consideration and judgment of the court; *Clarke v. Londrigan*, 11 Vroom.

A new examination can only be asked for on the ground that after the judgment of the court in the previous proceedings, the debtor had become possessed of property. in respect to which the creditor was entitled to examine him under the statute : *Id.*

FRAUD. See *Debtor and Creditor ; Judgment.*

Conveyance procured by—Equity.—Where a husband by fraud, collusion and artifice on his part, and others assisting him, procured a conveyance of his wife's property to one of his confederates, and the execution of an agreement in relation thereto and for other purposes, with the intention of discarding her and possessing himself of her property, it was held that a court of equity would not assist him in enforcing the agreement, or obviating a defect in his title caused by the mutilation of the deed he had thus obtained : *Furgo v. Goodspeed*, 87 Ills.

FRAUDS, STATUTE OF. See *Execution.*

HUSBAND AND WIFE. See *Fraud.*

Ante-Nuptial Contract—Whether Dower is barred.—Whether a widow can take the provisions made for her in the will of her husband, and also under an ante-nuptial contract, whereby her right of dower is barred, depends on the intention of the testator : *Bowen v. Bowen*, 34 Ohio St.

Where, by ante-nuptial settlement, a sum of money is secured to the wife, to be paid after the husband's death, and, by a subsequent will, the husband directs all his just debts of every kind to be first paid, and makes provision for the support of his wife during widowhood, with a declaration that the intent and meaning of the testator was to give to his wife the provision made for her in his will, she may claim the provision in the will, and also that made for her in the settlement : *Id.*

JUDGMENT.

Relief in Equity against—Excessive Damages.—The mere fact that a judgment by default in an action of trespass is for a sum much greater than it ought to have been, is not of itself evidence of fraud on the part of the plaintiff, and the plaintiff in such judgment is not responsible for errors in the assessment of damages, so as to justify a court of equity in setting aside the judgment : *Walker v. Shreve*, 87 Ills.

MECHANIC'S LIEN.

Contract—Waiver of Lien.—Where, by a building contract, the material men agree to take in payment second mortgages upon some of the houses, and it does not appear that demand has been made for such mortgages, or that there is inability to give them, no action can be brought under the statute for a mechanic's lien. Such contract is a waiver of the statutory lien : *Weaver v. Demuth*, 11 Vroom.

MISTAKE.

Whether of Law or Fact.—When a party, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect, this is a *mistake of law*, and not of fact ; *Birkhauser v. Schmitt*, 45 Wis.

In an action to recover moneys alleged to have been paid under a mutual mistake of fact, for a defendant's supposed interest in land, it appears from the complaint and plaintiff's evidence (for which see the opinion), that plaintiff had full knowledge of all the facts which affected, or were supposed to affect, the title to the land, before he purchased and paid therefor, and that the attorney-at-law of both parties, upon consideration of those facts, fully communicated by him to them, came to the legal conclusion and advised them that defendant had a certain interest in the land; and the parties acted upon such advice in the sale and purchase. *Held*, that the mistake thus shown was of law only, and the court erred in directing a verdict for the plaintiff: *Id.*

MORTGAGE.

Sale under Deed of Trust—Enforcement of Equities—Innocent Purchaser—Notice.—An agreement between the owner of land sold under a deed of trust, and the purchaser at the sale, for a reconveyance as soon as a debt due from the former to the latter shall have been paid out of the rents, cannot be enforced against a grantee of the purchaser who has bought without notice of the agreement, paid a substantial part of the purchase-money in cash, and given his negotiable promissory notes for the remainder. But it might be otherwise if, at the time of the trial, the notes remained in the hands of the first purchaser: *Digby v. Jones*, 67 Mo.

When in renewal of old one does not lose its priority.—Where a party takes a new mortgage to secure the payment of the same debt secured by a prior one, and this fact is stated in the later mortgage, no new note being taken, and gives a release of the old mortgage, which is recorded on the same day with the new mortgage, and there is no substantial difference in the two mortgages, this will not give priority to a mortgage given to another and recorded after the first and before the last of said mortgages: *Shaner v. Williams*, 87 Ills.

MUNICIPAL CORPORATION. See *Street*.

NAME.

Legacy to Corporation—Parol Evidence of Intention.—A testator gave a legacy to "The American and Foreign Bible Society." It appeared that there was an incorporated society of that name for the distribution of the Bible, established and mainly supported by the Baptist denomination; and another, incorporated earlier for the same general purpose, named "The American Bible Society," which was mainly supported by the Congregational and Presbyterian denominations. The latter society was sometimes called "The American and Foreign Bible Society," but there was no evidence that it was as well known by that name as the other society, and none that the testator had ever called it or heard it called by that name. Both societies were in the habit of soliciting contributions for their work from the neighborhood where the testator lived. The testator's denominational associations and preferences were wholly with the Congregationalists, and he had no special sympathy with the Baptist denomination. *Held*, that evidence was not

admissible, upon a claim of the American Bible Society to the legacy ; that while the will was being drawn the testator said to the scrivener that he wished to give the money to the Bible society sustained by the Congregationalists and Presbyterians ; that he was not sure as to its corporate name, but believed it to be " The American and Foreign Bible Society : " *Dunham v. Averill*, 45 Conn.

NEGLIGENCE. See *Railroad*.

Contributory—When Matter of Law—Allowing Cattle to Run in Vicinity of Railroad.—Plaintiff's premises, in a city, were so nearly surrounded by railroads running within a few feet of them, that his cow, if suffered to be at large, would be likely to get upon some one of said roads. She was accustomed to go for water to a canal on one side of his premises, and might go to a river on the other side, but to reach either must cross a railroad. Late in the fall, when grass was scarce, and there was none growing in the immediate vicinity of plaintiff's barn, his cow, after being housed until late in the day, was turned into the street without any one to look after her ; and not long after, being near but not upon the track of defendant's road, a few rods from plaintiff's premises, and near the river, feeding on grass growing on defendant's embankment, she started on the approach of a train, and, after running a short distance, was struck upon the track and fatally injured. In an action for the damages, the above facts appearing from plaintiff's evidence : *Held*, as a matter of law, that plaintiff was guilty of gross contributory negligence, and could not recover, in the absence of malice or wilfulness on defendant's part : *McCundless v. C. & N. W. Railway Co.*, 45 Wis.

The facts that the track was unfenced, and that the train was running somewhat faster than usual at that place, and was not slacked, nor any alarm given, would not have sustained a verdict that defendant was guilty of any wilful or malicious act ; and a compulsory nonsuit was properly granted : *Id.*

There was no error in rejecting evidence offered by plaintiff, that other cattle were in the habit of running at large in the vicinity of the place of accident, and that some of them had been killed on the track, as those facts would not aid his case : *Id.*

NUISANCE.

When Equity will enjoin.—A court of equity may interfere by injunction, to abate a nuisance, before the fact of the business being a nuisance is established at law, where there is danger of irreparable loss, or material injury being done, before a trial at law can be had ; as, where a slaughter-house is erected near the dwelling-house of another, and the business creates an offensive and unwholesome stench, and is likely to produce sickness or disease : *Minke v. Hopeman*, 87 Ill.

OFFICER. See *Surety*.

PARTNERSHIP. See *Equity*.

Renewal Notes—Payment—Surety.—The acceptance by a creditor of the note of an individual member of a firm after dissolution of the firm, in lieu of a matured note of the firm, is not an extinguishment of the firm debt, unless it is expressly agreed that it shall so operate : *Leabo v. Goode*, 67 Mo.

A surety on a note given after the dissolution of a firm, by one of the members of the firm, in renewal of a note of the firm, on which also he was surety, may recover of the other member of the firm money which he has paid in discharge of the renewal note : *Id.*

Liability of Firm for tort of one Partner.—If a member of a firm in the due course of business of the partnership, commits a tort or wrongful act by seizing and taking the property of another, and the same is appropriated to the use and benefit of the firm, thereby increasing its assets, the other partners will be liable for the same. *Durant v. Rogers*, 87 Ill.

Account stated.—The statement of an account between partners will be conclusive upon their rights, unless it is shown there has been some mistake, or omission, or accident, or fraud, or undue advantage, by which the same is vitiated, and the balance incorrectly fixed. In such case a court of equity will allow it to be opened and re-examined : *Guge v. Parmelee*, 87 Ill.

PLEADING.

Plea as to part of complaint only.—A plea which professes to answer and does answer only part of a count, is good, provided that part is material and severable from the rest of the count as a basis of recovery : *Flemming v. Mayor of Hoboken*, 11 Vroom.

PROBATE COURTS.

Administration of Estate of Person supposed to be dead, but really alive.—The only jurisdiction which the county court has in respect to the administration of estates, is over the estates of dead persons : *Melia v. Simmons*, 45 Wis.

Proceedings in administering, settling and assigning the estate of a person who, though represented to have deceased, was and still is alive, are absolutely void for all purposes ; and an entry and continuous occupation for ten years under claim of title exclusive of any other right, founded upon the judgment of the county court in such a case, would not bar an action to recover the land : *Id.*

RAILROAD.

Negligence.—Where a railroad company is authorized to propel its trains and operate its road by the use of steam locomotives, no inference of negligence arises from the mere fact that an injury to adjacent property was caused by sparks emitted from such locomotives : *Ruffner v. Cincinnati H. & D. Railroad Co.*, 34 Ohio St.

RECEIVER.

Title in another State—Conflict of Laws.—Where property has once vested in an assignee or receiver by the law of the state where the property is situated, the law of another state will not divest him of his right to it, if he should take it into such state in the performance of his duty : *Pond v. Cooke*, 45 Conn.

A receiver of an insolvent manufacturing corporation appointed by a court in New Jersey where it was located, took possession of its assets, and for the purpose of completing a bridge which it had contracted to build in this state, purchased iron with the funds of the estate, and sent

it to this state. *Held*, that the iron was not open to attachment in this state by a creditor residing here: *Id.*

And held that a party giving a receipt for the property to the officer who attached it, and taking it into his possession, was not liable to nominal damages in a suit brought upon the receipt after a demand and refusal: *Id.*

A receiver appointed by a court in such a case stands in the same position as an assignee or trustee in insolvency: *Id.*

SALE.

Question of Gift or Sale—Intention of Parties.—The plaintiff, being interested as a large bondholder in the early completion of a railroad, procured a quantity of timber for its bridges, specially prepared for that purpose, to have it ready when wanted. The timber was his own private property and he was under no obligation to furnish it for the road. A firm who subsequently contracted with the railroad company to complete the road and supply all the materials required, applied to him for the timber to use in the construction of the bridges, and he told them that they might have it. No terms were agreed upon and there was no express agreement that it should be used in constructing the bridges, but it was so understood on both sides. The plaintiff delivered the timber to the firm, who were transporting it to the place where it was to be used when it was attached by creditors of the railroad company. *Held*, that the transaction amounted to a sale to the firm, and that the plaintiff could not maintain replevin for the recovery of possession of it from the parties attaching it: *Colegrove v. Snow*, 45 Conn.

SHERIFF'S DEED.

Irregularity in the Sale.—If a sheriff's sale be made on a day different from that on which it is advertised to be made, the defendant in the execution, or his creditor, if damaged thereby, may by a timely application have the sale set aside; but where the sheriff has made a deed, good upon its face, to the purchaser, who was a stranger to the execution, and there is no evidence in any way connecting him with the mistake made, or tending to show it to have been fraudulent, the deed cannot be collaterally assailed, after the lapse of half a century, for such irregularity: *Houk v. Cross*, 67 Mo.

STREET.

Use of by Municipality.—The fee of the soil in the streets in the original town of Chicago, is either in the state or in the city, for the use of the public generally, and it was competent for the city, under legislative authority of the state, to construct a tunnel in one of the streets, and the city is not liable to an adjacent lot-owner for damages claimed on account of the construction of such a tunnel in the street, when the work is properly planned and executed, and no physical injury is done to the claimant's property, and there is enough of the street left for passage and ordinary travel: *City of Chicago v. Rumsey*, 87 Ill.

Eminent Domain—Right to condemn Property for a Street Railway.—The right of a corporation to condemn property and appropriate the same for the construction, operation and maintenance of a horse or dummy

railway in the streets of a city, is derived solely from the state law, and the consent of the city authorities to the construction and operation of such railway is not a condition precedent to proceedings to condemn. Such consent can be obtained after condemnation as well as before, and if given, is a mere license revocable at any time before it is acted on. *Metropolitan City Railway Co. v. Chicago W. D. Railway Co.*, 87 Ill.

SURETY. See *Partnership*.

For Public Office—Liability for Special Duties imposed on Officer.—The general rule is, that where an officer is required to perform a duty special in its nature, and to give a special bond for its faithful performance, no liability therefor attaches to his general bondsmen, in the absence of any declaration that they shall also be liable: *Supervisors of Milwaukee v. Ehlers*, 45 Wis.

UNITED STATES. See *Assignment*.

UNITED STATES COURTS. See *Bankruptcy*.

VENDOR AND PURCHASER.

Payment by Check as Cash—Withdrawal of Funds.—Where a vendor of land receives the vendee's bank check for the amount of a cash payment, a withdrawal by the vendee of his funds from the bank before presentation of the check, leaving nothing to pay it, is a fraud upon the vendor; and he will retain his equitable lien upon the land for the amount of such check. So held where the vendee's funds were withdrawn about two weeks, and the check presented nearly four weeks, after its date: *Madden v. Barnes*, 45 Wis.

VERDICT.

Finding in substance what is in issue—Rule as to quantum of Evidence.—Where issue is joined, in an action to recover damages for an assault and battery, as to the guilt of the defendant, and whether or not the injury to the plaintiff was occasioned by his own fault in first assaulting the defendant, and the jury by their verdict "do find and say that the plaintiff is entitled to nine hundred and ninety dollars, damages in the above case," such verdict is substantially a finding of the issue in favor of the plaintiff: *Shaul v. Norman*, 34 Ohio St.

In such action it is not necessary for the plaintiff to prove the assault and battery beyond a reasonable doubt: *Id.*

WITNESS.

Privileged Communications—Client and Attorney.—Where the accused in a criminal trial becomes a witness in his own behalf, he cannot be compelled, on cross-examination, to disclose the confidential communications between himself and his attorney; nor can such disclosures be required of the attorney without the consent of the accused. It is the privilege of the accused to have such communications protected from compulsory disclosure, and the privilege is not waived by his becoming a witness: *Duttenhofer v. The State*, 34 Ohio St.

WAIVER. See *Escape*; *Mechanic's Lien*.

Question of Fact.—A waiver is an intentional relinquishment of a known right. The existence of such an intent is a matter of fact: *First National Bank v. Hartford Life and Annuity Ins. Co.*, 45 Conn.

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SALES AND CONVEYANCES WITHOUT DELIVERY OF POSSESSION.

DECISIONS UPON THE RULE IN TWYNE'S CASE SINCE 1866.

THE subject of fraudulent conveyances was reviewed and the decisions in the various states carefully collated by Mr. WALLACE, in the note to *Twyne's Case*, 1 Sm. Lead. Cas. It may prove of value to examine the later cases on this subject, decided within the past fifteen years, and note such changes as may have taken place within that time. The cases have all resolved themselves pretty generally into two classes.

1. Where retention of possession by the vendor or mortgagor is deemed fraudulent in law, *per se*, and, 2. Where retention of possession is *prima facie* fraud, but open to explanation, the force of which it is for the jury to decide.

In the first class many cases are governed by strictly construed statutes, passed with the object apparently of counteracting the tendency on the part of the courts to a relaxation of the rule in *Twyne's Case*. Of all these, California enforces the principle of fraud *per se* as rigidly as it is anywhere found. In *Woods v. Bugbey*, 29 Cal. 466 (1866), the rule is laid down. This was an action against the sheriff for damages, for seizing and taking in execution a brick-kiln, as the property of one O'Neill, which the plaintiff claimed as his by virtue of a sale. It was in evidence that no change of possession had taken place, but it was also found as a

matter of fact that the transaction was *bona fide* and free from actual fraud. The statute of California is as follows: "Every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor or the creditors of the person making such assignment or subsequent purchasers in good faith;" and sec. 17, "No mortgage of personal property hereafter made shall be valid against any other persons than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee" (Laws 1850, p. 267). CURREY, J., delivering the opinion of the Supreme Court, says, that "the kind of possession which it was necessary for the mortgagee to have of the mortgaged property, to place it beyond the reach of the creditors of the mortgagor, was an actual possession. * * * What constitutes an actual and continued change of possession is well stated in *Stevens v. Irwin*, 15 Cal. 506, and in *Godchaux v. Mulford*, 26 Cal. 323," and quoting the opinion in *Lay v. Neville*, 25 Id. 552, the court there say, "It was intended that the vendee should immediately take and continuously hold the possession of the goods purchased, in the manner and accompanied with such plain and unmistakable acts of possession, control and ownership as a prudent *bona fide* purchaser would do in the exercise of his rights over the property, so that all persons might have notice that he owned and had possession of the property." After further discussion, CURREY, J., said, "We think the case clearly within the mischiefs to prevent which the statute was passed, and that judgment ought to have been for the defendant instead of the plaintiff." There was a petition for a rehearing, and upon that the same judge delivered the opinion, in which he re-asserted his former position with greater vigor, making a comparison between the statutes and decisions of New York and other states and those of California, and concluding, "No excuse or explanation for want of an actual and continued change of possession can be entertained, and it is quite useless to cite decisions made under the statutes of Elizabeth, and of New York, or other states, allowing the want of an immediate delivery and an actual and continued change of possession to be explained or accounted for, as authoritative expositions of the rule which our statute has prescribed." See also as to what constitutes sufficient

change of possession : *Ford v. Chambers*, 28 Id. 13, and *Regli v. McClure*, 47 Id. 612.

Connecticut. In *Osborne v. Tuller*, 14 Conn. 529, all of the preceding cases were reviewed, and the note to *Twyne's Case* finds the result of the decisions to be that "the rule is one of policy and not of intention; that it is not enough that the jury find that the sale was *bona fide* and for a full consideration; though evidence of that is proper to be submitted to the jury to repel actual fraud, there must be shown some reason for the retention *legally* sufficient and satisfactory; the presumption of fraud is a presumption of law, and the law judges of the cases in which it does not arise, and the jury are to be instructed by the court as to the sufficiency of the facts, and reasons alleged to justify the retention." *Lake v. Morris*, 30 Conn. 201. "There is no rule, however, which enables a court to say, from one or more particular acts of intermeddling with property by the vendor after a sale, that they amount to the retention of the possession of it, so as to render the sale void as against creditors. The fact of such possession is indeed conclusive evidence of a colorable sale. But whether in fact there has been such a retention of possession must always be a question for the jury." The rule was stated more stringently in *Webster v. Peck*, 31 Conn. 495. In *Norton v. Doolittle*, 32 Id. 405, upon the point reserved for the court, it was held that there being a restoration of possession after a formal delivery, the sale was void, although the *bona fides* was not doubted, BUTLER, J., saying: "The policy which dictates it, and the prevention at which it aims, require its rigid application to every case where there has not been an actual, visible and continued change of possession:" affirmed in *Hall v. Gaylor*, 37 Conn. 550 (1871), and *Hatstat v. Blakeslee*, 41 Id. 301 (1874). Mortgages not made in accordance with the requirements of the statute are void, where there is a retention of possession by the mortgagor, not only as against attaching creditors, but an assignee in insolvency: *Gaylor v. Harding*, 37 Conn. 508. But an executory contract, under which the vendee is allowed to have possession, with an agreement that the title shall not pass until the payment of a certain sum at a fixed time, will be sustained against the creditors of the vendee: *Hughes v. Kelly*, 40 Conn. 148.

In Delaware one case has recently been brought in the Superior Court, Fall Session, 1871, *Taylor v. Richardson*, 4 Houst. 300, in which GILPIN, C. J., charged the jury that to entitle the plaintiff in an action of replevin to recover the goods, which happened to be

machinery, they "must be satisfied that there was an actual sale of them by Scott to him, and that it was not a pretended sale merely, for the purpose of preventing his creditors from seizing them for the payment of his debts; and that they were delivered to him in a reasonable and convenient time after such actual sale to him; that is to say, as soon as it could conveniently have been done under the circumstances, with the exercise of due and proper diligence and attention on his part for that purpose. * * * And if they were satisfied on both those points that such was the case, their verdict should be for the plaintiff, but if not, for the defendant;" a charge which seems entirely in accord with the Delaware statute, which enacts that the sale shall be void except as against the vendor, unless there shall be an actual delivery "as soon as conveniently may be after the making of such sale."

In Florida the only case reported within the past ten years appears to be *Smith and Wife v. William Hines*, 10 Fla. 258, in which it was held that fraud might be inferred from the circumstances, as, whether the vendor keeps the bill of sale or retains possession of the goods or any part of them.

Illinois maintains pretty closely the rule of ten years ago: *Tickner v. McClelland*, 84 Ill. 471; *Allen v. Carr*, 85 Id. 388. It has been held that if delivery has been made to the vendee upon secret conditions they cannot bind a *bona fide* purchaser: *W. U. Railroad Co. v. Wagner*, 65 Ill. 197; *Young v. Bradley*, 68 Id. 553. And although it is necessary as matter of law that there shall be an *actual change* of possession, it is not necessary to a complete transfer that the vendee should remain in possession. If, after the delivery to the purchaser, he subsequently returned it to the vendor, it may be a circumstance tending to show only a colorable transaction, more or less cogent, according to the circumstances. But it certainly may be explained: *Wright v. Grover*, 27 Ill. 426. If a mortgagor of horses keep them in his possession, the mortgage is bad as against a subsequent *bona fide* purchaser or mortgagee: *McCormick v. Hadden*, 37 Ill. 370, and if possession remain with the mortgagor after maturity creditors are not bound: *Hanford v. Obrecht*, 49 Ill. 146; *Lemen v. Robinson*, 59 Id. 115. But retention of possession after a judicial sale does not render it void: *Hanford v. Obrecht*, *supra*. Under the revised statutes a loan of personal property is good for five years: *Peters v. Smith*, 42 Ill. 417.

Iowa seems not to have been noticed in the note to *Twyne's*

Case. The code of Iowa provides that as against existing creditors a sale of chattels, where the vendor remains in possession, is invalid, unless a written instrument conveying the same is duly executed, acknowledged and filed of record. This act has been strictly construed, and where there was no record it has been held void: *Prather & Parr v. Parker*, 24 Ia. 26. It seems from a very recent case that possession alone constitutes fraud, unless the act has been complied with, and that the *bona fides* of the transaction does not affect subsequent creditors: *Boothby & Co. v. Brown*, 40 Ia. 104. "If, therefore, the property be left with the seller, whose relations to it continue unchanged so far as the world may know by the acts of the parties, the possession will be regarded as continuing in him:" BECK, J., *Ib.* But where one becomes a creditor subsequent to a mortgage, and after notice of the same, the mortgage is good against him, upon the theory which prevails in all cases under the recording acts, that recording is merely constructive notice, and intended to take the place of actual notice: *McGavran v. Haupt*, 9 Ia. 83. It has been expressly held that possession may be retained where the terms of the act have been complied with: *Kuhn v. Graves*, 9 Ia. 303. But even under a recorded bill of sale, if anything remains to complete the sale, as to fix the quantity or price, as in the case of the sale of growing crops, it is void as against a subsequent execution: *Snyder v. Tibbals*, 32 Ia. 447. And when there has been no recorded instrument, but the price paid and property left with the vendor to finish, as in the case of a buggy, such possession is fraudulent in law against a *bona fide* mortgage: *Hesser & Hale v. Wilson*, 36 Ia. 152.

In Kentucky, it was said by HARDIN, J., in *Morton v. Ragan & Dickey*, 5 Bush 334 (1869), "The principle is well settled, as applicable to private sales of movable property, that the possession must accompany the title, or the sale will be *per se* fraudulent and void in law as to subsequent purchasers and creditors of the vendor, even though the contract contains a stipulation that the seller is to retain the possession until a future day: *Brummel v. Stockton*, 3 Dana 135; *Robbins v. Oldham*, 1 Duvall 28." But the same case held that the rule did not apply to property not liable to execution. Where the property is not identified as a sale of so many of a number of barrels of whiskey in a bonded warehouse, no title passes as against an execution: *May v. Hoaglan*, 9 Bush 171. Secret conditions that title shall not vest in the vendee until payment of the

purchase-money, are void as against subsequent creditors or purchasers of the vendee: *Vaughn v. Hopson*, 10 Bush. 337. See also *Greer v. Church & Co.*, 13 Id. 430.

In Maryland, which was originally classed among the states holding retention of possession, in case of sales, fraudulent in law, no change seems to have taken place. In *Kreuzer v. Cooney*, 45 Md. 582, it was held that the recording of a bill of sale, as required by the code, was equivalent to transfer of possession. *Thompson et al. v. Baltimore & Ohio Railroad Co.*, 28 Md. 396, is an interesting case, in which it was said that constructive delivery of iron was sufficient to pass the title; but it was held, that the vendor's lien was not thereby lost in case of the vendee's insolvency.

In Missouri, the law has undergone several changes. In the earlier cases, as was said in the note to *Twyne's Case*, the principle of that case was closely followed; but subsequent decisions tending to make the question one of *bona fides*, somewhat unsettled the rule, until the statute of 1855 practically declared the law to be as pronounced in *Shepherd v. Trigg*, 7 Mo. 151. But in 1865 a new law was passed, changing the original act by the insertion of a section which declared that "every sale made by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by delivery in a reasonable time (regard being had to the situation of the property), and be followed by actual and continued change of the possession of the things sold, shall be held to be fraudulent and void as against the creditors of the vendor or subsequent purchasers in good faith:" Wagner's (Mo.) Statutes 281, § 10. This, as was said by WAGNER, J., in *Clafin v. Rosenberg*, 42 Mo. 439 (1868), cited in *Allen v. Massey*, 17 Wall. 351, practically unsettled the law of the previous twenty years and restored the ancient rule; and under this statute it has been uniformly held that the *bona fides* of the transaction need not be determined by the jury, unless they first find that there has been some open, notorious or visible act, clearly and unequivocally indicative of delivery and possession, and that not a joint or concurrent possession: *Lesem v. Herriford*, 44 Mo. 323; *Bishop v. O'Connell*, 56 Id. 158; *Burgert v. Borchert*, 59 Id. 80 (1875). What is a "reasonable time" must be determined by the circumstances of each case: *Bishop v. O'Connell*, *supra*. Nor will a *bona fide* purchaser from the vendee stand in any better position than the original vendee: *Lesem v. Herriford*, *supra*. It seems to be settled that, under the statute, in case of chattel mortgages,

either possession or recording is essential: *Bevans v. Bolton*, 31 Mo. 487.

In Pennsylvania, *Clow v. Wood*, the leading case up to 1855, was recognised as the highest authority in 1870 by SHARSWOOD, J., in *McKibbin v. Martin*, 14 P. F. Smith 356. "*Clow v. Wood*, 5 S. & R. 275, decided by this court in 1819, is the magna charta of our law upon this subject. * * * It established that retention of possession was fraud in law wherever the subject of the transfer was capable of delivery, and no honest and fair reason could be assigned for the vendor not giving up and the vendee taking possession. * * * Whenever the subject of the sale is capable of an actual delivery, such delivery must accompany and follow the sale to render it valid against creditors. The court is the tribunal to judge whether there is sufficient evidence to justify the inference of such a delivery." This case decided that where there was *actual delivery* it was a question of fact for the jury whether all that was necessary had been done, or whether there was any deception practised in effecting the change. *Vide*, also, *Bentz v. Rocky*, 19 P. F. Smith 71. The character of the property and the circumstances of the transfer will be taken into consideration by the court, and the jury will be allowed to judge whether all that was necessary to be done has been done: *Haynes v. Hunsicker*, 2 Casey 58; *Dunlap v. Bourbonville*, Id. 72; *Barr v. Reitz*, 3 P. F. Smith 256; *Long v. Knapp*, 4 Id. 514; *Billingsley v. White*, 9 Id. 464; *McMarlan v. English*, 24 Id. 296; *Bond v. Bronson*, 30 Id. 360; *Sheldon v. Sharpless*, 2 W. N. C. 311. The strict rule is not without its exceptions. A *bona fide* sale of goods in the hands of a bailee by the vendor is good against the vendor's creditors, unless the vendor re-take possession before the vendee: *Worman v. Kramer*, 23 P. F. Smith 378; *Woods v. Hull*, 1 W. N. C. 442. The transfer must be *actual*, *continuing* and *exclusive* in the vendee; *concurrent* possession is evidence of fraud: *Miller v. Garman*, 19 P. F. Smith 134; *Brawn v. Keller*, 7 Wright 104; *Steelwagon v. Jeffries*, 8 Id. 407; *Dewart v. Clement*, 12 Id. 413; *Garman v. Cooper*, 22 P. F. Smith 32; *Worman v. Kramer*, *supra*; *McMarlan v. English*, *supra*.

Where from the nature of the case *exclusive* possession is impossible, *e. g.*, a post-nuptial settlement by a husband upon his wife, concurrent possession is not fraudulent: *Larkin v. McMullin*, 13 Wright 29. Assignments recorded within the thirty days allowed

for recording are not within the principle of *Twyne's Case*: *Dallam v. Fidler*, 6 W. & S. 323, approved in *Whitney's Appeal*, 10 Harris 505; *Heckman v. Messinger*, 13 Wright 473; *Marks's Appeal*, 4 Norris 231.

The distinction drawn in *Lehigh Co. v. Field*, 8 W. & S. 232, between conditional sales and bailments, as evidenced by *Martin v. Mathiot*, 14 S. & R. 214, and that case, has been maintained, notwithstanding the editor's note to the contrary in Smith's Leading Cases. Delivery of possession, with a reservation that the vendor may recover possession upon failure to pay all of the purchase-money, or with a lien reserved by the vendor, is fraudulent as against creditors of the vendee or *bona fide* purchasers from him: *Haak v. Linderman*, 14 P. F. Smith 499; *Waldron v. Haupt*, 2 Id. 408; *Euwer, Assignee, &c., v. Van Giesen et al.*, 6 W. N. C. 363. Bailments, where the right of possession is not parted with, and no actual sale has taken place, but only an agreement to sell at a future time, are not fraudulent in law: *Chamberlain v. Smith*, 8 Wright 431; *Rowe v. Sharp*, 1 P. F. Smith 26; *Becker v. Smith*, 9 Id. 469. If the vendee allows the vendor to remain in possession, or after delivery immediately gives him possession, and the vendor sells to a *bona fide* purchaser for value without notice, the purchaser can hold the goods. It is held that this is common law and not dependent upon the statute: *Shaw v. Levy*, 17 S. & R. 99; *Davis v. Bigler*, 12 P. F. Smith 242: Per SHARSWOOD, J.

But "retention of possession by the former owner of a chattel sold at sheriff's sale, is not an index of fraud, because the sale is not the act of the persons retaining, but of the law; and because a judicial sale, being conducted by the sworn officer of the law, shall be deemed fair till it is proved to be otherwise. * * * A chattel thus purchased, then, may safely be left in the possession of the former owner on any contract of bailment the law allows in any other cases:" *Myers v. Harvey*, 2 Penn. 478; *Craig's Appeal*, 27 P. F. Smith 448.

In *Coble v. Nonemaker*, 28 P. F. Smith 501, it is said that a chattel mortgage without change of possession is void as to creditors, but the *decision* was that a purchaser with notice could not take advantage of the defect. See also *Euwer v. Van Giesen*, *supra*. By the Act of May 18th 1876, P. L. 181, mortgages in writing and duly acknowledged, for any sum not less than \$500, upon lumber, iron and coal oil in bulk, iron tanks, tank cars, iron

ore mined and prepared for use, manufactured slate and canal boats, are valid when properly recorded : but unless renewed, the time lasts but one year.

In New Hampshire the rule laid down in the federal courts and declared in *Coburn v. Pickering*, 3 N. H. 415, still prevails, and *Coburn v. Pickering* has been supported by numerous subsequent decisions, to the effect that when the secret trust has been established, the fraud *ipso facto* follows, as a conclusion of law, without regard to the intention of the parties : *Coolidge v. Melvin*, 42 N. H. 510 ; *Shaw v. Thompson*, 43 Id. 130 ; *Lang v. Stockwell*, 55 Id. 561 ; *Cutting v. Jackson*, 56 Id. 253 (1875). The act requiring a chattel mortgage to be recorded is still in force, and when there is a retention of possession without recording it, is void in law : *Piper v. Hilliard*, 52 N. H. 209 ; *Putnam v. Osgood*, 51 Id. 192 ; and where there is an agreement that the mortgagor may sell the goods for his own benefit, such a secret trust will render the mortgage void, even though entered into after the mortgage has been completed ; but possession by the mortgagee will answer instead of recording : *Janvrin v. Fogg*, 49 N. H. 340.

(2.) The second class into which we have divided the cases comprises the larger number of the state courts, in which it is the rule that the question of fraud is one of fact for the jury ; and, although the retention of possession raises a presumption of fraud, it may be rebutted by proof of the *bona fides* of the parties.

In Alabama, in *Mayer v. Clark*, 40 Ala. 259 (1866), BYRD, J., held that, "Where the possession of a chattel remains with the vendor, it is, as to creditors, a badge of fraud simply and not fraud *per se* : *Hobbs v. Bibb*, 2 Stew. 54. 336 ; 5 Ala. 531, 780 ; 14 Id. 814 ; 24 Id. 219. Possession remaining with the vendor, unexplained, is *prima facie* evidence of fraud, and if consistent with good faith and the absolute disposition of property, and the transaction is *bona fide* throughout, then the title passes by the contract of sale, notwithstanding the possession remains with the vendor : *Millard's Adm'rs v. Hall*, 24 Ala. 219. * * * The true rule would seem to be that possession of personal property after a sale remaining with the vendor, is a badge of fraud, which, if unexplained, would be sufficient to authorize a verdict against the vendee. But if explained, as required in the case of the *Bank v. Borland*, 5 Ala. 539, then the title of the vendee will not be affected by the possession of the vendor." *Wyatt v. Stewart*, 34 Ala. 721 (1859), held "that the retention of possession after the sale by a maker

of a deed of trust of property sold upon notice at public outcry by the trustee, is not *prima facie* evidence of fraud: *Montgomery v. Kirksey*, 26 Ala. 172; *Maulden & Terrell v. Mitchell*, 14 Id. 814."

SAFFOLD, J., said, in *Moog v. Benedicks*, 49 Ala. 512 (1873), that it was error to charge that a vendor's remaining in possession of the goods and selling them as before, was such a badge of fraud as could only be overcome by proof of compensation paid to him as the vendee's agent. "If he acted without reward it would only have been a circumstance indicative of fraud, but not inconsistent with good intention." And see *Crawford et al. v. Kirksey et al.*, 55 Id. 282.

Arkansas. Possession by the vendor after the sale, if connected with explanatory facts, is not sufficient to sustain a charge of fraud; and it was even held error to introduce evidence to affect the bill of sale, or to show that the transaction it witnessed was anything else than the bill of sale recited: *George v. Norris*, 23 Ark. 121 (1861). Where from the character or situation of the property, actual delivery is impossible, a constructive delivery will suffice: *Puckett v. Reed*, 31 Id. 131; *Trieber v. Andrews*, Id. 163.

Indiana. The Statute of Frauds expressly declares that the question of fraudulent intent shall be one for the jury. "If there was not an actual, visible and continuous change of possession, the transaction was *prima facie* fraudulent, but upon that point * * * the question of fraudulent intent was for the jury:" *Nutter v. Harris*, 9 Ind. 91; *Kane v. Drake*, 27 Id. 29. But where the instrument evidencing the sale or mortgage is on its face fraudulent, the court may declare it so without referring to the jury: *Jenners v. Doe*, 9 Ind. 461. Relied on in *Robinson v. Elliott*, 22 Wall. 522 (1866). "The retention by the vendor of the possession is *prima facie* evidence of fraud, and throws on the party who would sustain the sale, the burden of rebutting the presumption of fraud arising from such continued possession by the vendor, and in the absence of such explanatory proof, fraud is inferred from the fact that the vendor retains the possession, and it was proper that the court should so charge the jury:" *Kane v. Drake*, *supra*.

Louisiana is not cited in the note to *Twyne's Case*. The Code provides, art. 1916, "If the vendor, being in possession, should by a second contract, transfer the property to another person, who gets the possession before the first obligee, the last transferee is considered as the proprietor, provided the contract be made on his part *bona fide* and without notice of the former contract." Art.

1917, "If personal property be transferred by contract, but not delivered, it is liable in the hands of the obligor" (vendor) "to seizure and attachment in behalf of his creditors." Other parts of the code define what is possession, and in *McCloskey v. Central Bank of Alabama*, 16 La. Ann. 284, these sections are construed in connection with art. 2456 C. C., in which it is said that, "In all cases where the thing sold remains in the possession of the seller because he has reserved to himself the usufruct or retains possession by a precarious title, there is reason to presume that the sale is simulated, and with respect to third persons, the parties must produce proof that they are acting in good faith and establish the reality of the sale. It was held that while the failure of the vendee to take possession might, under the terms of the last clause, be explained, a failure to show the title of the vendee in any way would be within the terms of the preceding sections, and that such a sale was void as against an execution. See, also, *Jorda v. Lewis*, 1 La. Ann. 59; *McCundlish v. Kirkland*, 7 Id. 614; *Zacharie v. Kirk*, 14 Id. 433. It seems therefore that the distinction drawn is between those cases in which the vendor is allowed to remain in possession under a contract or by a precarious title, and those in which he is allowed to remain by mere neglect. In the former cases, the fact is open to explanation, in the latter the presumption cannot be rebutted by proof of good faith. The presumption raised by art. 2456 C. C. must be rebutted by strong evidence: *Bernard v. Auguste*, 6 La. Ann. 24; *Nichols v. Botts*, 6 Id. 437; *Keller v. Blanchard*, 19 Id. 53; *Sullice v. Gradenigo*, 15 Id. 582. But *bona fides* and transfer of possession may be shown, sufficient to repel the presumption: *Miltenberger v. Parker*, 17 Id. 254.

In Massachusetts, no change has taken place in the rule that the retention of possession is merely evidence of fraud for the jury: *Ingall v. Herrick*, 108 Mass. 351 (1871), where a number of cases are cited.

In Maine, it is the province of the court to say what is delivery sufficient to constitute a good sale: *Bethel Steam Mill Co. v. Brown et al.*, 57 Me. 9; *Fairfield Bridge Co. v. Nye*, 60 Id. 372; *Mosher v. Smith*, 67 Id. 172. In the case of a sale by a husband to his wife, although no actual fraud was alleged, it was held that there should have been some formal delivery to evidence the change of title: *McKee v. Garcelon*, 60 Id. 165. But in *Googins v. Gilmore*, 47 Id. 9, the lower court was affirmed in its refusal to enter a non-suit in the case of a mortgage of perishable property, in which it

was agreed that the mortgagor should remain in possession, and it was held to be a question for the jury: see also *Emmons v. Bradley*, 56 Id. 333, in which it is said, quoting from the opinion in *New England Ins. Co. v. Chandler*, 16 Mass. 279, "in the case of a bill of sale or other conveyance of property apparently absolute, proof of any secret trust or agreement inconsistent with the tenor of the agreement [conveyance] is undoubtedly evidence of a fraudulent bargain made for the purpose of defeating or delaying creditors. This is mentioned in *Twyne's Case* as one of the badges of fraud. But it is not fraud in itself or conclusive evidence of fraud." Conversely a sale and delivery with a secret stipulation that the title shall not vest until payment of the purchase-money is void against attaching creditors of the vendee: *Boynnton v. Libbey*, 62 Me. 253.

In Michigan it has been frequently held and asserted that the statute changed the old rule, and made the question of fraud always one for the jury: *Jackson v. Dean*, 1 Doug. 519; *Bragg v. Jerome*, 7 Mich. 145; *Gay v. Bidwell*, Id. 519. But in *Hatch v. Fowler*, 28 Id. 205 (1873), it was held to be error to have refused to charge the jury that in the case of retention of possession, "such sale would be deemed fraudulent and void as against the creditors," upon the ground that, by this rule, the jury were to determine whether sufficient had been shown to rebut such a presumption, and that, as a rule of evidence for the jury, it held good. A chattel mortgage recorded in accordance with the statute, is valid: *People v. Bristol*, 35 Mich. 28.

The Minnesota Statutes at Large 692, § 15, provide that retention of possession shall be deemed fraudulent and void, "unless those claiming under such sale or assignment make it appear that the same was made in good faith and without any intent to hinder, delay or defraud such creditors or purchasers," which seems to make the question clearly one for the jury: *Blackman v. Wheaton*, 13 Minn. 326 (1868).

In Mississippi, *Comstock v. Rayford*, 20 Miss. 369, seems to have been decided upon the principle that retention of possession was only *prima facie* evidence of fraud, and the *onus probandi* is thrown upon the vendee: *Carter v. Graves*, 6 How. 9, and *Rankin v. Holloway*, 3 S. & M. 614. In the case of public forced sales, fraud is purely a question of fact, and it was held error, in such a case, to instruct the jury that if there was not such an exclusive possession by the vendee the sale was "collusive and fraudulent, * * *

unless satisfactorily explained :” *Garland v. Chambers*, 11 S. & M. 337, and *Ewing v. Cargill*, 13 Id. 79. Recording a mortgage is equivalent to an actual delivery : *Hundley v. Buckner*, 6 Id. 70. But retention of possession is not *per se* fraudulent : *Hilliard v. Cagle*, 46 Miss. 309. Nor is a conditional sale : *Ketchum & Cummins v. Brennan*, 53 Id. 594.

New York. In New York the current of the later cases in the Court of Appeals seems to have been pretty definitely settled in the course given to it by *Hanford v. Artcher*, 4 Hill 272, by the old Court of Errors ; and even the Supreme Court, with whom the disagreement was at first so great after the passage of the Revised Statutes in 1830, seems to have acquiesced in the rule, that although retention of possession is presumptive evidence of fraud, it is nevertheless a question for the jury, and not the judge, to decide. In *Mathews v. Poultney*, 33 Barb. 127 (1860), the facts, as found by the judge before whom an action to set aside an assignment was tried at special term, were that the assignor of the stock, &c., of a grocery store was allowed to remain in possession ; that he conducted the business for the assignee, without any compensation ; that the sign over the store remained as before in the name of the assignee, and that there were various other circumstances, which, unexplained, would have been conclusive evidence of fraud ; but, upon the weight of all the evidence, “the justice was unable to discover any actual fraud.” On appeal to the Supreme Court, the court say : “Taking possession of the assigned property, an actual and continued change of the possession and all analogous facts, are but facts, the absence of which shows or tends to show a fraudulent intent in the making of the assignment. And the evidence as to such facts, like that which may be offered as to facts prior to, and immediately connected with, the making of the assignment, is left for both its credibility and its weight to the tribunal (whether judge or jury) which tries the questions of fact ;” cited approvingly in *Juliand v. Rathbone*, 39 Barb. 102. In the Superior Court, in *Stewart v. Slater*, 6 Duer 83, “the paramount and controlling authority” of *Hanford v. Artcher*, was adverted to. *Vide Champlin v. Johnson*, 39 Barb. 608 ; *Johnson v. Curtis*, 42 Id. 588, and *Spicer v. Waters*, 65 Id. 233 (1866). And the Court of Appeals, although originally not decidedly affirming *Hard v. Anfrotcher*, follows the same line of authority, and regards the *intent* as the only real ground for holding retention of possession to be fraud. *Ball v. Loomis*, 29 N. Y. 415 (1864) : “Such facts are presump-

tive evidence of fraud and conclusive, unless rebutted by affirmative evidence of good faith and the absence of an intent to defraud."

Mitchell v. West, 55 N. Y. 107 (1873), was an action for the alleged conversion of personal property. The property was left after the sale in the vendor's possession and was levied upon by virtue of a writ of ~~execution~~ against the vendor by the defendant. Upon the trial the court was asked to charge that it was the duty of the vendee (the plaintiff) to give some reason, which the court could approve, for his allowing the goods to remain in the vendor's possession, which the court refused. On appeal, RAPALLO, J., said, "The principal point urged on the part of the appellant is, that in addition to proof that the sale of the chattels was *bona fide*, and that there was no intent to defraud the creditors of the vendor, it was necessary to show some valid excuse or reason for leaving the property in his possession; or stated in another form, that the absence of intent to defraud creditors cannot be established without showing a good reason for the want of change of possession. We regard this point as settled by the decision of the Court of Errors in *Hanford v. Artcher*, 4 Hill 271." To the same effect see *May v. Walter*, 56 N. Y. 8, and *Tilson v. Terwilliger*, Id. 273. In *May v. Walter*, indeed, the case was referred back to the jury, overruling the charge of the court below, that evidence of a fair price having been paid was sufficient to establish the *bona fides*.

New Jersey seems to have been singularly free from cases involving this point since 1866, but *Runyon v. Groshon*, cited in the note to *Twyne's Case*, is re-affirmed in *Parr v. Brady*, 8 Vroom (37 N. J.) 201. After referring to *bona fide* purchasers as affected by chattel mortgages, BEDLE, J., says, "In favor of the latter," (*bona fide* purchasers) "the only judicial question has been whether, if there is no change in the possession of the property, that fact is to be considered as *prima facie* evidence of fraud. That, however, is only a matter of evidence, and does not affect the validity of the instrument if there is no fraud. The possession can always be explained. Assuming our common-law rule to be as held in *Runyon v. Groshon*, 1 Beasley 87, the New Jersey Statute of Frauds provides for the recording of chattel mortgages 'unaccompanied by immediate delivery and actual and continued change of possession,' and makes void as against creditors those not recorded.

North Carolina still belongs to this class, as the rule was originally laid down in *Rea v. Alexander*, 5 Ired. 644. At least no subsequent case seems to have overruled or doubted it.

In Ohio, *Collins & McElroy v. Myers*, 16 Ohio 547, cited in the note to *Twyne's Case*, to hold "that a continuance of possession, with a power of disposition and sale on the part of the mortgagor, either expressed or implied, is necessarily fraudulent and void as against creditors, as such a mortgage is no security to the mortgagor and of no effect but to ward off other creditors," has been explained in *Kleine, Hegger & Co. v. Katzenberger & Co.*, 20 Id. 110, to mean that it is the power of disposition retained by the mortgagor "for the mortgagor's own benefit," and where "the power of sale is such as to leave in the mortgagor a dominion over the property, inconsistent with the alleged lien of the mortgage that the latter has been held *per se* fraudulent and void." But where the mortgagor merely acts as agent for the mortgagee it is for the jury to determine the *bona fides* of such an arrangement: *Ib.* Nor will the acquiescence by the mortgagee in a subsequent sale of the mortgaged property render the mortgage void, unless at the time the mortgage was given such an understanding existed: *Clark v. Morris*, 2 Am. Law Record 364.

In Rhode Island it was held not to be error to instruct the jury that a bill of sale of a farm and utensils made by an insolvent to a relative, where possession was retained by the vendor and his family, was *prima facie* evidence of fraud. In the opinion in the Supreme Court, BULLOCK, J., said that there could be no doubt that the facts as above stated "when proved, tend to show such sale merely colorable, not conclusive of course, but circumstances proper for the jury to weigh, and from which, in the absence of explanatory evidence, they may infer that such sale is in fact fraudulent:" *Sarle Arnold*, 7 R. I. 582; certainly not a very harsh rule of evidence when the circumstances of that case are considered.

In Texas, OGDEN, P. J., said (*Thornton v. Smith*, 39 Tex. 544): "If it be admitted that the assignor retained possession or concurrent possession with one of the assignees, still this would be at most only a badge of fraud, susceptible of explanation, and which we think was fully explained by the testimony in harmony with the claim of a *bona fide* transaction."

Wisconsin. The statute of this state has been pretty strictly enforced, by requiring such an "actual" change of possession as the statute contemplates, in order to rebut the presumption of fraud. It means such a change, that the vendor ceases to possess the goods in any capacity whatever: *Grant v. Lewis*, 14 Wis. 187. In *Osen v. Sherman*, 27 Wis. 505 (1871), LYON, J., said, "The

portions of the general charge to which exceptions were taken, are to the effect that, if, after the sale by Lang to the plaintiff, they held possession of the property conjointly, or if Lang continued in possession thereof as the agent of the plaintiff, or if the plaintiff permitted Lang to remain in possession thereof and control the business, the presumption of fraud attached, and the burden was upon the plaintiff to remove such presumption by evidence. We think that the circuit judge stated the law in that behalf correctly to the jury; for how can it be said that there is 'an actual and continued change of possession' from the vendor to the purchaser of the thing sold, if such vendor still has dominion over it, either conjointly with the purchaser, or as his agent, or the manager of his business? We find no error in the charge of the court."

But "there may undoubtedly be an honest sale, and the vendor left in possession in good faith as the vendee's agent. But it looks so much the other way, on the face of it, without explanation, that the statute makes the mere fact of the continued possession of the vendor presumptive evidence of fraud, and conclusive, unless the purchaser shows, by satisfactory evidence, that there was really no intent to defraud, that burden being thrown upon him." PAINE, J., in *Grant v. Lewis*.

Nearly all of the decisions upon the question in which it has been theoretically discussed in the Supreme Court have arisen on appeal from the Circuit Court of the District of Columbia; and where this has not been the case, under these last decisions of the United States Supreme Court, the laws of the respective states were held to govern. *Allen v. Massey*, 16 Wall. 351, an appeal from the Circuit Court of Missouri, was a case in which the parties to the transaction lived in the same house. A sale of household furniture was made by one to the other, both using the furniture alike, and exactly as before. The assignee in bankruptcy of the vendor having filed a bill to have the sale annulled, the District Court of Missouri rendered a decree to that effect; this decree was affirmed by the Circuit Court and the defendants appealed. Mr. Justice FIELD, delivering the opinion, said: "The sale was within the terms of the statute fraudulent and void as against Downing's creditors. * * * In the case of *Claffin v. Rosenberg*, 42 Mo. 439, where the vender had become clerk of the purchaser, the Supreme Court of Missouri held that the possession which the purchaser was required to take of the property sold, in order to

render the sale valid under the statute must be open, notorious and unequivocal. * * * The statute being a local one, applying only to sales in Missouri, the court will follow the construction given to it by the highest court of the state." And in *Robinson v. Elliott*, 22 Wall. 513, where the question arose under a chattel mortgage in Indiana, and the statute of the state was relied on, the court took great pains to ascertain the construction of the statute in that state, and Mr. Justice DAVIS says, in the opinion, "Although we have been unable to find any case from Indiana of similar facts with the one at bar, yet the decision in the *New Albany Insurance Co. v. Wilcoxson*, 21 Ind. 355, would seem to imply, that when such a case did arise, it would be decided in accordance with the views we have presented," and the court in its judgment, was governed by the tendency of the state court.

N. D. M.

RECENT AMERICAN DECISIONS.

Supreme Court of Vermont.

STATE v. TATRO.

The application of the common law rule, that a criminal offence is neither excused nor mitigated by the voluntary intoxication of the person who commits it, in trials for murder, is not affected by No. 44, Acts of 1869, making degrees of murder.

Thus, where it appears on trial for murder that the murder was done by some kind of wilful, deliberate, and premeditated killing other than by means of poison or by lying in wait, the degree of the offence is not lessened by proof that at the time it was committed the respondent was intoxicated, any more than it would be if it had been perpetrated by means of poison or by lying in wait.

INDICTMENT for the murder of Alice Butler, on the evening of June 2d 1876. At about 7 o'clock in the evening of the day of the alleged murder, Charles Butler, the husband of the murdered woman, left his house to go to a neighboring village, leaving behind the respondent, who was then at work for him, as he had been at intervals for two or three years before that time. On entering his house on his return at about 9 o'clock, he found the dead body of his wife lying on the floor, with marks of blows from some heavy instrument on the head.

The evidence on the part of the respondent tended to show that at the time of the alleged murder, the respondent was laboring under delirium tremens, acute mania, or some form of delirium resulting from excessive use of alcoholic drink, whereby he was

rendered incapable of premeditating, or forming a design; and expert testimony was introduced as to the nature and effects of delirium tremens.

The respondent requested the court to charge that if at the time of the commission of the act in question, the respondent was so far under the influence of intoxicating liquor as to be in a condition bordering on delirium tremens, and was unable to premeditate or form a design, malice could not be implied from the use of the deadly weapon with which the act was committed; that if he was so intoxicated as to be possessed of a mania, and was unable to deliberate or form an intent, then the act would be excusable homicide, or manslaughter at the most; and that malice could not be implied from the use of a deadly weapon, unless it was used with deliberation and not in the heat of passion.

The court charged that under the act of 1869, all murder perpetrated by means of poison or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, &c., should be deemed murder in the first degree, and charged appropriately as to what under that act constituted other degrees of murder. The court also charged that an insane person was not punishable for his criminal acts; that insanity consisted in the incapacity to distinguish between right and wrong as to the act charged, and that in the eye of the law a person in the paroxysms of delirium tremens was insane. The court then called attention to the expert testimony upon the subject of that disease. Upon the question of intoxication as an excuse, the court charged as follows:

"The voluntary intoxication of one who without provocation commits a homicide, although amounting to a frenzy, that is, although the intoxication amounts to a frenzy, does not excuse him from the same construction of his conduct, and the same legal inferences upon the question of premeditation and intent, as affecting the grade of his crime, which are applicable to a person entirely sober. * * * I don't want to be misunderstood about this, and shall therefore repeat what I consider to be the law upon this point, that is, that if a party gets so intoxicated that he is crazy drunk, that it amounts to a frenzy, so that he does not know what he is doing, and if in such a condition he should commit a crime, which, if committed by a sober man would be murder, it is equally murder in the man that is thus drunk."

Verdict, guilty of murder in the first degree.

G. A. Ballard, Willard Farrington, and F. W. McGettrick, for the respondent.—The charge upon the question of intoxication was to the effect that the jury had no right to consider or weigh it in determining the degree of the crime; that a man who became voluntarily intoxicated, so that he did not know what he was doing, was not allowed to have that fact affect the grade of his crime, although he could not know, deliberate, or meditate upon the act before committing it. That was erroneous. *State v. Johnson*, 40 Conn. 136; *People v. Doyell*, 48 Cal. 85; *Jones v. Commonwealth*, 75 Penna. St. 403; 1 Am. Crim. Law, s. 41; 3 Greenl. Ev., s. 148; 15 Am. Law Reg. 505. The court having charged that there was no express malice, the respondent could not be convicted of murder in the first degree. *State v. Johnson*, 40 Conn. 136; s. c. 41 Conn. 584.

H. R. Start, state's attorney, and *H. S. Royce*, for the state.—The charge upon the subject of the effect of the intoxication of the respondent was correct: *The People v. Rogers*, 18 N. Y. 9, 27, and cases there cited; 1 Am Crim. Law, ss. 38, 41; *Smith v. Wilcox*, 47 Vt. 537; 2 Greenl. Ev. 374.

The opinion of the court was delivered by

REDFIELD, J.—[After noticing some points as to the jurors and the evidence, not of general interest.] The more important question arises upon the charge of the court upon the effect of intoxication upon the grade of the offence. The court charged the jury that voluntary intoxication could neither excuse nor mitigate the offence. There is, perhaps, no principle or maxim of the common law of England more uniformly adhered to than that voluntary drunkenness does not excuse or palliate crime. Lord COKE, in his Institutes, declares that "whatever hurt or ill he doeth, his drunkenness doth aggravate it:" 3 Thomas's Coke Lit. 46. And in his reports, *Beverley's Case*, 4 Coke 123 b, 125 a, he says: "Although he that is drunk is for the time *non compos mentis*, yet his drunkenness does not extenuate his act, or offence, nor turn to his avail." And Sir MATTHEW HALE, eminent alike for his humanity and learning, says of drunkenness, which he calls *dementia affectata*: "This vice doth deprive men of the use of reason, and puts many men in a perfect but temporary frenzy; * * but by the laws of England, such a person shall have no privileges by his voluntary contracted mad-

ness, but shall have the same judgment as if he were in his right senses." And Lord BACON, in his "Maxims of the Law," (Rule 5), in that comprehensive language which clearly defines and gives the reasons for the rule of law, thus asserts the doctrine: "If a madman commit a felony, he shall not lose his life for it, because his infirmity came by act of God; but if a drunken man commit a felony, he shall not be excused, because the imperfection came by his own default." In *Burrow's Case*, Lewin 75, A. D. 1823, HOLROYD, J., thus defines the rule: "It is a maxim in the law that if a man gets himself intoxicated he is answerable to the consequences, and is not excusable on account of any crime he may commit when infuriated by liquor, provided he was previously in a fit state of reason to know right from wrong." And the cases of *Rex v. Gridley* and *Rex v. Menkin*, 7 C. & P. 297, show the uniformity of this rule in the courts of England. In the case of *The People v. Rogers*, 18 N. Y. 9, the Supreme Court had reversed the conviction of Rogers on the ground that the court had excluded the evidence of the respondent's drunkenness, as affecting the criminal intent. But the case was, by writ of error, carried to the Court of Appeals, and the whole law upon that subject was reviewed and canvassed with great learning and ability by Chief Justice DENIO and HARRIS, J. HARRIS, J., says: "The Supreme Court seem to have understood that in all cases where without it the law would impute to the act a criminal intent, drunkenness may be available to disprove such intent. I am not aware that such a doctrine has before been asserted. It is certainly not sound. The adjudications upon the subject, both in England and this country, are numerous, and characterized by a singular uniformity of language and doctrine. They all agree that where the act of killing is unequivocal and unprovoked, the fact that it was committed while the perpetrator was intoxicated cannot be allowed to affect the legal character of the crime." But it is insisted that under the statute which makes "*degrees*" of murder, drunkenness qualifies and mitigates the higher offence. The statute declares that "all murder which shall be perpetrated by means of poison, or by lying in wait, or any other kind of deliberate and premeditated killing, * * shall be deemed murder in the first degree." The same or similar statute has been enacted in most of the states. And many courts have allowed drunkenness to be shown in mitigation of the higher offence. In the case of *State v. Jackson*, 40 Conn. 136, the court

held that intoxication, as tending to show that the prisoner was incapable of *deliberation*, might be given in evidence. Chief Justice SEYMOUR dissented, and FOSTER, J., who tried the case below, did not sit, so that the four judges constituting the court were, in fact, equally divided. The same case came before that court again in 41 Conn. 584, and the opinion was delivered by the same judge. The court were hard pressed with the former opinion in the same case, and that it had taken a departure from the common law. But the court repelled the intimation, and declared that "we have enunciated no such doctrine," but "held on a trial for murder in first degree, which under our statute requires *actual express malice*, the jury might and should take into consideration the fact of intoxication, as tending to show that such malice did not exist." And, in the same opinion, the judge says: "Malice may be implied from the circumstances of the homicide. If a drunken man take the life of another, unaccompanied with circumstances of provocation or justification, the jury will be warranted in finding the existence of malice, though no express malice is proved. Intoxication, which is itself a crime against society, combines with the act of killing, and the evil intent to take life which necessarily accompanies it, and all together afford sufficient grounds for implying malice. Intoxication, therefore, so far from disproving malice, is itself a circumstance from which malice may be implied. We wish, therefore, to reiterate the doctrine emphatically, that drunkenness is no excuse for crime and we trust it will be a long time before the contrary doctrine, which will be so convenient to criminals and evil-disposed persons, will receive the sanction of this court." This reasoning seems to us both illogical and incongruous. To constitute murder of the first degree, the act must, indeed, be done with *malice aforethought*. And that malice must be *actual*, not *constructive*. At common law, if the accused shoot his neighbor's fowls, and by accident kill the owner, he is guilty of murder, yet he did not intend to *murder* but to *steal*. Such cases are excluded by the statute from the definition of murder in the first degree. But "where the act is committed deliberately, with a deadly weapon, and is likely to be attended with dangerous consequences, the malice requisite to murder will be presumed; for the law infers that the natural and probable effect of any act deliberately done was intended by its actor:" 2 Am. Crim. Law, s. 944. "And intent for an instant before the blow, is sufficient to constitute malice:" Id. 948. It will be ad-

mitted that if the respondent had killed his victim "by poison, or lying in wait," the act would have been murder in the first degree, and the fact that he was intoxicated could not have been admitted to excuse or palliate the crime. Yet it is claimed that if the circumstances show that the murder was deliberately planned, and executed with fiendish barbarity and malice, drunkenness may come in to palliate the crime.

This, we think, is making a distinction without a difference. Chief Justice HORNBLOWER, 1 Am. Crim. Law, s. 1103, speaking of the New Jersey statute, which is like ours, says: "This statute in my opinion, does not alter *the law of murder* in the least respect. What was murder before its passage is murder now—what is murder now was murder before that statute was passed. It has only changed the punishment of the murderer in certain cases: or rather, it prescribes that, in certain specified modes of committing murder, the punishment shall be death, and in *all other kinds of murder* the convict shall be punished by imprisonment."

The evidence, so far as detailed in this case, if believed, shows a murder most fiendish and shocking. He destroyed the last resisting vitality of this woman, struggling for her life, with an axe, which shows malice and malignity of purpose. The language of Chief Justice MCKEAN, while discussing a like statute in Pennsylvania, and in a case quite similar to this, is fitting and sensible. He says: "It has been objected that the amendment of our penal code renders *premeditation* an indisputable ingredient to constitute murder in the first degree. But still it must be allowed that the intention remains, as much as ever, the true criterion of crime, in law as well as in ethics; and the *intention* of the party can only be collected from his words and actions. * * But let it be supposed that a man without uttering a word should strike another on the head with an axe, it must on every principle by which we can judge of human actions, be deemed a *premeditated* violence:" *Respublica v. Mulatto Bob*, 4 Dall. 145. The statute has in no degree altered the common-law definition of murder. But the killing a human being by poison, or lying in wait, or by purposely using a deadly weapon to that end, is murder in the first degree; and the purpose and intent to kill must be determined by the circumstances of the case; for the murderer takes with him no witnesses, and does not often avow his purpose.

Where the requisite proof is adduced to show a wicked, inten-

tional murder, he is not permitted to show a voluntary and temporary intoxication in extenuation of his crime.

The respondent takes nothing by his exceptions.

Some confusion seems to exist as to the proper effect of intoxication in criminal prosecutions. On the one hand, it is often said to be an aggravation rather than an excuse for crimes. Blackstone's familiar language is, that as to "artificial, voluntarily contracted madness by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary phrensy; our law looks upon this as an aggravation of the offence, rather than as an excuse for any criminal misbehavior: 4 Bl. Com. p. 25. Lord Coke, also, used similar language: 4 Co. 125, a; 3 Thomas Coke 46.

But obviously this can not be true. Simple larceny is only simple larceny, however intoxicated the thief; a common assault and battery does not become an "aggravated assault," nor manslaughter increase to murder, by the fact that the perpetrator was under the influence of intoxicating liquors, though voluntarily taken. It is quite erroneous, therefore, to use such language to a jury as it is very likely to mislead, and may be sufficient to set aside a verdict. See *Ferrell v. The State*, 43 Tex. 507 (1875); *McIntyre v. The People*, 32 Ill. 514.

On the other hand, it is frequently declared that drunkenness is never an excuse for, or even an extenuation of a crime. In one sense, that is undoubtedly true. If the crime has been in fact committed, if a defendant has deliberately and with malice aforethought committed a homicide, it is no excuse or extenuation that he was at the moment of its commission, deeply intoxicated. He might have become so simply to nerve himself for the act, or his act might be wilful and malicious although he was intoxicated; and his condition would not even reduce the crime to manslaughter or to murder

in the second degree: *Commonwealth v. Hawkins*, 3 Gray 466 (1855).

If he has intentionally committed an assault and battery, the fact that he was intoxicated cannot of itself excuse or extenuate his act. What would be murder in a sober man is not reduced to manslaughter merely because the perpetrator was then intoxicated, even though such condition was not produced for the purpose of committing the crime.

Some countenance was given to such a view in *Smith v. The Commonwealth*, 1 Duv. 220; and *Bleinn v. The Commonwealth*, 7 Bush 320, but the error was afterwards discovered and corrected by the same court in *Shannahan v. The Commonwealth*, 8 Bush 463 (1871).

And such is the well-established and only safe rule of law; *People v. Rogers*, 18 N. Y. 1; *State v. Turner*, Wright 30; *State v. John*, 8 Ired. 330; *Cornwall v. The State*, Mart. & Yerg. 147; *Pirtle v. The State*, 9 Humph. 663; *U. S. v. Clark*, 2 Cranch C. C. 158; *U. S. v. McGlue*, 1 Curtis C. C. 1; *Carter v. The State*, 12 Tex. 500.

But between these two extremes there is a broad middle ground, where the fact of drunkenness may be entitled to weight, not as an excuse for the crime, nor even as an extenuation, but as tending to show that in fact no crime, or not the particular crime charged, was ever committed.

Whenever the existence of some particular intent, motive or knowledge must be actually and expressly proved by the evidence, and is not necessarily inferred from the fact itself, then the question of ability to form such intent, cherish such motive, or possess such knowledge, is important; and if such inability was owing to intoxication, it should have the same effect as if due to any other excuse, no more, no less

Ferrell v. The State, 43 Tex. 508 (1875).

Thus, in a prosecution for passing counterfeit money, the knowledge of the character of the coin is an essential fact to establish by evidence. The defendant may therefore always show he was so intoxicated at the time he could not discriminate between genuine and spurious money; this evidence might not be *conclusive*, for it might be shown in reply that he had made or procured the money for an unlawful purpose when sober, but unless controlled by some other evidence, the fact of such intoxication, if fully established, might be a complete defence: *Pigman v. The State*, 14 Ohio 555 (1846), where the reasons for such a rule are well stated by READ, J.; *United States v. Roudenbush*, 1 Bald. 518 (1832).

In an indictment for larceny it might be shown in evidence that the defendant was too intoxicated to distinguish the property taken from his own of a similar appearance, or that he was too confused and bewildered to form an intention of stealing, or to know he was doing so; but this might not be conclusive, as he might have formed the design before, when sober: see *Wenz v. The State*, 1 Tex. Ap. 36 (1876); *Bailey v. The State*, 26 Ind. 422 (1866); *State v. Schingen*, 20 Wisc. 74 (1865); *People v. Walker*, 17 Am. Law Reg. N. S. 473 (1878).

So where a person is indicted for perjury, in having falsely described a former transaction *in pais*, he may show in defence that he was so grossly intoxicated at the time and place where the transaction occurred that he could not then correctly understand what was done, and so in mis-stating it in court he did not do so knowingly and corruptly: *Lytle v. The State*, 17 Am. Law Reg. N. S. 535.

So a person indicted for "knowingly" voting twice at the same election—under a statute—may prove he was so intoxicated the second time as to be un-

able to know he had voted before; and if so he could not be convicted: *The People v. Harris*, 29 Cal. 678 (1866). It might be different if the statute made it penal to vote, without regard to the actual knowledge or intention of the voter, as seems to have been held in *State v. Welsh*, 21 Minn. 22 (1874).

On a charge of an assault "with intent to kill," in order to convict of the *whole offence*, the specific intent must be proved to exist; it is not necessarily inferred from the *mere fact* of the assault, although the mode and manner of the assault may be sufficient to prove it; if, therefore, the accused was really too drunk to be capable of forming any intention whatever, and none such had ever existed before, it would be a defence to that part of the charge, though not to the minor offence of a common assault: *Regina v. Cruse*, 8 C. & P. 541; *Regina v. Monkhouse*, 4 Cox C. C. 55; *People v. Hammill*, 2 Parker C. C. 223, 235; *Mooney v. The State*, 33 Ala. 419; *State v. Garrey*, 11 Minn. 154; *Nichols v. The State*, 8 Ohio St. 435.

So if a statute defining murder in the first degree, requires it to be done "deliberately and premeditatedly," evidence that the defendant was too much intoxicated to deliberate and to premeditate is certainly competent, and if the jury find the fact to be so, and there was no evidence of prior premeditation, a jury certainly would be warranted, if not required, in finding not guilty of that degree of murder. But the intoxication is not an excuse or extenuation as a matter of *law*, but only a circumstance to be considered by the jury: *Jones v. The Commonwealth*, 75 Penn. St. 403 (1874); *Pirtle v. The State*, 9 Humph. 663, a valuable case on this point; *State v. Johnson*, 40 Conn. 136 (1873); 41 Id. 577; *People v. Williams*, 43 Cal. 345 (1872); 21 Id. 544, 27 Id. 507. But see *contra*, *The State v. Cross*, 27 Mo. 332.

So in such cases evidence of intoxica-

tion is *competent* upon the question whether the killing sprang from premeditation or from sudden passion excited by inadequate provocation; that is, whether the intention to kill preceded the provocation or was produced by it: *Haile v. The State*, 11 Humph. 154; *Swan v. The State*, 4 Id. 136; *Jones v. The State*, 29 Geo. 594; *Rex v. Thomas*, 7 C. & P. 820.

But inadequate provocation for a sober man, insufficient to mitigate his act, will not, *in and of itself*, have such effect in case of an intoxicated person. There are not two rules of sufficient provocation, one for sober men, and one for drunken men: *Keenan v. The Commonwealth*, 44 Penn. St. 55, an excellent case on this point. And see *State v. McCunto*, 1 Speers 384.

But the effect and weight of the fact of intoxication, as tending to show the absence or want of some specific intent or of premeditation, is solely for the jury. It is a matter to be considered by them. The court, as a matter of law, do not draw any conclusions from it either way. The fact of intoxication at the moment, is of course not conclusive of a want of intent or premeditation. The intent may have been formed before, or it may exist, notwithstanding the intoxication, and concurrently with it. The defendant is not entitled to a charge or instruction that intoxication *will* show a want of intent:

The State v. White, 14 Kans. 538 (1875); *Smith v. The State*, 4 Nev. 278 (1876); *State v. Avery*, 44 N. H. 398 (1862); *Kenny v. The People*, 39 N. Y. 330; *O'Brien v. The People*, 48 Barb. 280.

But where the crime is made out from implied malice, such as an unprovoked assault and battery or murder, a malicious stabbing, or maliciously poisoning a horse, the malicious intent being sufficiently proved by the act itself, the fact of drunkenness has very little, if any weight, as a defence: see *Nichols v. The State*, 8 Ohio St. 435 (1858), a case of malicious stabbing; *The People v. Porter*, 2 Parker C. C. 14, a case of blasphemy; *O'Hernin v. The State*, 14 Ind. 420; *Dawson v. The State*, 16 Id. 428; *State v. Harlow*, 21 Mo. 446, a case of manslaughter; *Choise v. The State*, 31 Geo. 424; *State v. Mullen*, 14 La. Ann. 570; *The State v. Gut*, 13 Minn. 343; *Golden v. The State*, 25 Geo. 527; *State v. Johnson*, 41 Conn. 577.

And that view seems to have led to the decision in *State v. Tatso*, since the learned judge speaks of the evidence of the mode and manner of the crime as showing "malice and malignity of purpose," although it is possible the last sentence in the reported instruction to the jury may not be entirely consistent with some of the decisions stated above.

EDMUND H. BENNETT.

Court of Errors and Appeals of New Jersey.

HURFF v. HIRES.

Where there is a sale of a specified quantity of goods from a mass, identical in kind and uniform in value, a separation of the quantity sold is not necessary to pass the title, where the intention of the parties that the property should pass by the contract of sale is clearly *manifested*; otherwise, where the articles composing the mass are of different qualities and values, making a selection, and not merely separation, necessary.

The defendant bought of one H. two hundred bushels of corn out of a lot of four or five hundred bushels in H.'s crib-house. He inspected and approved of the corn

as it laid in bulk, and paid the price in cash. The arrangement between the defendant and H. was that the corn should be left in the crib until it was hardened, and then H. was to deliver it. The whole lot of corn was then levied on by the plaintiff as sheriff, under an execution against H. After the levy H. measured out and delivered two hundred bushels of it to the defendant. In trover by the sheriff : *Held*, that a charge to the jury, that the two hundred bushels the defendant bought not having been separated from the entire bulk, no property in it passed to the purchaser, and that the whole was liable to levy under the execution against H., and that the defendant was liable to the sheriff for the value of the two hundred bushels, was erroneous.

HURFF, the plaintiff in error, in the fall of 1873, purchased of one Heritage two hundred bushels of corn, out of a lot of four or five hundred bushels, which Heritage had in his crib-house.

He inspected and approved of the corn before he bought it, and paid the cash for it immediately on the purchase. The arrangement between Hurff and Heritage was that the corn should be left where it was until it should get hard enough to keep well in bulk, and then Heritage was to deliver it. In January 1874, Hires, as sheriff of the county of Gloucester, by virtue of an execution against Heritage, levied on the entire quantity of the corn as his property. After the levy Heritage delivered two hundred bushels of the corn to the defendant, whereupon the sheriff brought trover against him. The defendant requested the court to instruct the jury that if he and Heritage, at the time of the sale of the corn, both meant and understood the sale to be complete, the property in the corn passed to defendant, and the plaintiff could not recover its value for his refusal to return it after it was separated and delivered to him by Heritage.

This request was refused, and the court charged that notwithstanding Hurff bought and paid for two hundred bushels of Heritage's corn, before there was any levy upon it, yet as it appeared it was in bulk with other corn, and not separated at the time of the sale, no property in the corn passed to Hurff, but remained in the defendant in execution, and was bound by the levy. And that, therefore, the defendant was liable to the sheriff for the value of the corn he received by the delivery of Heritage.

Error was assigned on the charge as given, and the refusal to charge as requested. The case in the Supreme Court is reported in 17 Am. Law Reg. N. S. 11, with a note.

D. J. Pancoast, for plaintiff in error.

H. L. Slape, for defendant in error.

The opinion of the court was delivered by.

DEPUE, J.—By the twentieth section of the act concerning executions, if any person shall purchase in good faith of a defendant in execution, any goods or chattels, and pay for the same, prior to the levy of the execution, and without notice thereof, the title of such purchaser shall not be divested by the fact that such execution had been delivered before such purchase was made: Revision 393. This section was passed with a view to change the common-law rule that goods and chattels were bound by an execution from the time of its teste, and to qualify the provisions of the eighteenth section of the same act, which gave an execution force against goods and chattels only from the time of its delivery to the sheriff; but it clearly indicates the legislative policy of protecting the rights of *bona fide* purchasers from executions against the vendor, where it may be done consistently with the rules of law. Delivery of the goods purchased is not essential to the protection of the purchaser's rights.

A purchase in good faith, without notice of the execution and payment of the price, prior to actual levy, are the conditions under which his title is good.

The corn was purchased by Hurff, and paid for in good faith before the execution was issued.

It was lying in the bulk unseparated when the levy was made; and after levy, was separated from the mass, and delivered by the vendor. The case was tried in the court below on the theory that, though the purchaser bought the corn and paid the price, the title did not pass to him because the quantity sold was not separated from the original bulk until after levy, and that, therefore, the whole still remained liable to seizure as the property of the vendor.

If the property had remained in bulk, the quantity purchased never having been separated from the mass, the purchaser might not have been able to maintain replevin, for the reason that in replevin the plaintiff must be the owner of the specific chattels he sues for, and must describe them in his writ: *Scudder v. Warsler*, 11 Cush. 573. But that does not solve the question involved in this case. May not a party who has bought and paid for a specified quantity or number of articles from a larger mass, identical in kind and uniform in value, maintain trover against a third person who converts the whole, or defend in trover brought by an officer levying on the whole as the property of the vendor, when a separation of the quantity he was entitled to under his purchase has been

made after levy, and possession thereof has been delivered to him?

It is the general rule that the property in goods and chattels passes under the contract of sale according to the intention of the parties. The difficulty in the application of this rule is in determining under what circumstances the parties shall be considered as having *evinced* an intention that property in the subject-matter of sale should pass from the vendor to the purchaser. The cases on this subject are quite numerous, and are not harmonious.

Those which have been decided on the peculiar language of the Statute of Frauds have held a very stringent rule. Where the right of an unpaid vendor to retain the goods is involved, courts have laid hold of slight circumstances to retain in him the property until the purchase-money be paid: *Hansen v. Meyer*, 6 East 614; *Wallace v. Breeds*, 13 Id. 522; *Shipley v. Davis*, 5 Taunt. 617; *Rusk v. Davis*, 2 M. & S. 397; *Swanwick v. Southern*, 9 A. & E. 901; *Goalts v. Rose*, 17 C. B. 229. Another class of cases are those in which the contract is to supply goods of a particular description, which would be fulfilled by furnishing any goods of the quality and kind agreed to be furnished: *Austin v. Craver*, 4 Taunt. 644; *Wait v. Baker*, 2 Exch. 1. There is still another class of cases where the sale is completed in all respects, except that the bulk from which the property purchased is to be separated, is not identical in kind or uniform in value, and some advantage may be derived from the privilege of selection: *Tooke v. Marsh*, 51 N. Y. 288. The question whether the property has passed under a contract of sale, has generally arisen where the right of an unpaid vendor is in the issue. Payment of the price is so essential an ingredient of a sale that neither in law nor in morals is the buyer entitled to have the goods until he pays for them. The lien of the vendor is waived where payment is to be made at a future day, or there has been a delivery actual, and in some cases merely constructive; hence the inclination of the courts to hold on slight circumstances that the contract is so incomplete that a transfer of title was not intended, where the delivery is constructive only, and the insolvency of the buyer has intervened with the contract price unpaid. Prominent also among the cases in the same direction are those in which the right of the purchaser to object to the quality of the article, which is the subject-matter of the contract of sale, is involved. Here, also, there is an inclination to hold the title to be in obedience of any well-grounded objection to quality is

apparent. A contract for the delivery of goods merely of a particular description is necessarily executory; and where it relates to a certain quantity from a large bulk, not uniform in quality or value, the transaction is so incomplete that until selection, and not mere separation, is made, the rights of the parties respectively are undefined. In cases like those mentioned, it is considered for substantial reasons that the title does not pass immediately upon the terms of the contract being agreed on; not that these cases create exceptions to the rule that the property will pass by the contract, if such be the intention of the parties; but the circumstances are such and of such weight that it is presumed that it was not the intention of the parties that the sale should be complete.

The case under review is distinguished by marked peculiarities from those embraced in the foregoing classification. The contract of sale was not obnoxious to the Statute of Frauds; the price was paid, and consequently no right of a vendor to have the unpaid purchase-money existed; nothing remained to be ascertained or adjusted to determine what the rights of the parties were; the property had been inspected and approved; it was left with the vendor for the purchaser's convenience; and the mass from which quantity alone was to be separated was identical in kind and uniform in value, so that the privilege of selection would not confer any advantage upon either party. Nothing was left undone by the parties except measuring out the quantity purchased from any part of the whole bulk—a ministerial act, which might be done by either party, or by any stranger, as well as by the parties themselves.

The tendency of the modern decisions is to give effect to contracts of sale according to the intention of the parties to a greater extent than is found in the older cases, and to engraft upon the rule, that the property passes by the contract of sale if such be the intention, fewer exceptions, and those only which are founded on substantial considerations affecting the interests of parties.

At one time it was held that under an agreement to purchase an entire bulk, at a specified price, the property did not pass if the whole amount of the purchase-money depended upon an ascertainment by weight or measurement subsequently to be made: *Hanson v. Meyer*, 6 East 614. This decision was made in favor of an unpaid vendor, and was afterwards distinguished on the ground that the weighing was to be done by the seller, and it was held that the property would pass if such was the intention of parties, though something was to be done, such as weighing, measuring or testing

the goods, to ascertain the contract price, if what remained to be done was to be done by the buyer: *Turley v. Bates*, 2 H. & C. 200. This distinction was adopted in *Roswell v. Green*, 1 Dutcher 391. Still later the English courts entirely repudiated this distinction, and held, in cases where the weighing was to be done by the seller, the property would pass, though the ultimate contract price was to be ascertained by a subsequent weighing, if the parties so intended; and COCKBURN, C. J., in his opinion, said that "it is equally clear, that in point of principle, and in point of common sense, there is nothing to prevent a man from passing the property to the thing he proposes to sell, and the buyer proposes to buy, although the price may remain to be ascertained afterwards:" *Martineau v. Kitching*, L. R. 7 Q. B. 436; *Castle v. Playford*, L. R. 7 Exch. 98. It may now be considered as the law of the English courts that where the contract price has been paid or advances made on it the property will pass to the buyer, according to the intention of the parties, although something remains to be done by the seller to complete the goods in conformity with the contract, before they are ready to be delivered: *Young v. Matthews*, L. R. 2 C. P. 127; *Langton v. Waring*, 18 C. B. N. S. 315.

That the parties contemplated the corn should be measured before it left the vendor's possession will not of itself prevent the property passing. Nor will the fact that the vendor was required to deliver it when the time for delivery arrived, accomplish that result. Where the goods sold have been selected and designated, and the price paid, the property will pass by the contract of sale, though it was one of the terms of the contract that the vendor should transport them to a place named for delivery: *Terry v. Wheeler*, 25 N. Y. 520. The case, therefore, must stand exclusively on the fact that no separation of the quantity sold had been made from the entire bulk before the execution was levied; and the question is whether there is a rule of law requiring, under the circumstances of this case, a separation of the quantity sold from the larger bulk before title will pass to the purchaser, so positive in its sanction as to overrule the intention of the parties.

It is undoubtedly the doctrine of the English courts that where there is a bargain for a certain quantity *ex* a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit, there the right to them does not pass to the vendee until the vendor has made his selection: per BAYLEY, J., *Gillett v. Hill*,

2 C. & M. 530. This doctrine is founded on correct principles where the gross bulk is variable in kind or quality, and the selection from it of that part which shall be delivered is of benefit to the vendor. It has been applied to a sale of a specified quantity from a larger bulk of uniform kind and value, where the purchaser had seen the goods in bulk and approved of it: *Aldridge v. Johnson*, 7 E. & B. 885.

In my judgment this principle should not be applied where the bulk from which the quantity purchased is to be separated is uniform in kind and quality, and has been approved by the purchaser, and the full contract price has been paid.

There is a clear and well-settled legal distinction between the individual rights of several parties in goods of uniform kind and quality, and in those in which there is no uniformity in these respects. It is recognised in cases of a co-tenancy of personal property readily divisible by weight or measurement into portions absolutely alike in quality and value. In such cases either tenant may take his proper proportion, and it will be regarded as a proper severance so long as he does not take more than his share; but the rule is otherwise in case of property not severable in this manner; in that event the partition must be by agreement, or proceedings in equity: *Tripp v. Riley*, 15 Barb. 333; *Channon v. Lusk*, 2 Lansing 211; *Clark v. Griffith*, 24 N. Y. 595; *Freeman on Co-tenancy*, § 252; 6 Am. Law. Rev. 458. It is also recognised in cases of the intermingling of the goods of several owners where the whole is undistinguishable in quality and value. In *Jackson v. Anderson*, 4 Taunt. 24, one F. at Buenos Ayres consigned to L. & Co. a barrel containing 4718 Spanish dollars, and advised the plaintiff that 1969 of them were designed for him as a remittance of the net proceeds of sales made by him on plaintiff's account.

L. & Co. assigned the bill of lading to the defendants, who received the whole value of the \$4718, and carried it to the credit of L. & Co. In an action of trover the plaintiff was allowed to recover. No separation was ever made of the \$1969 which the plaintiff should have received, and consequently there was no individualization of the specific dollars he was entitled to. It was contended by the defendants that no separation having been made of the \$1969 to enable the plaintiff to designate them as his property, trover was not maintainable. The objection was overruled, and MANSFIELD, C. J., said, "It appears that no separation was ever made from the whole quantity of \$1969 belonging to the

plaintiff, and an objection has been taken on that ground against the form of action; but we think there is no difficulty on that point; the defendant has disposed of all the dollars; consequently, he has disposed of those which belonged to the plaintiff; and as all are of the same value it cannot be a question what particular dollars were his; * * * one has a right to a certain number, and the other to the rest; if a man keeps all, and has no right to a part, the action lies for that part which he wrongfully detains."

In *Gardner v. Dutch*, 9 Mass. 427, the plaintiff, in the adjustment of the accounts of a voyage performed for W. & R. in the schooner *Liberty*, became entitled to 76 bags of coffee lying in a lot of bags, and not distinguished by marks, or in any manner separated from the others. As against an officer levying on the whole by virtue of an attachment against W. & R., the plaintiff was allowed to maintain replevin for his part, the court saying, "though the bags belonging to him had no distinguishing marks, he might have taken the number of bags, and the quantity of coffee, to which he was entitled by his own selection, while they remained in the hands of W. & R., and the defendant as a deputy sheriff could not change the rights of third parties."

There are authorities of great weight that apply this doctrine to contracts of sale. In *Whitehouse v. Frost*, 12 East 614, the defendants, Dutton and Bancroft, were the owners of forty tons of oil in the oil-house at Liverpool, of which they held the key. They sold ten of the forty tons to Frost, who in turn sold the same to Townshend, who afterwards became bankrupt, and the plaintiffs were his assignees. The oil, at the time of the purchase by Townshend, and when he became bankrupt, was lying in the cistern, mixed with the other oil. The plaintiffs were nevertheless held entitled to maintain trover, though the oil had never been separated from the quantity in the cistern. In *Woodley v. Coventry*, 2 H. & C. 164, one Clarke had purchased of defendants, who were corn factors, 350 barrels of flour of specified brands, and received from them a delivery order. Clarke sold 348 barrels to the plaintiffs, and gave them a delivery order, which was accepted by the defendants. The defendants having afterwards refused to make delivery, the plaintiffs brought trover. The defendants had in their warehouse a much larger quantity of flour of the specified brands, and there had been no separation or appropriation of any particular barrels to Clarke. It was objected on behalf of the defendants, that as there had been no appropriation of any specific barrels of flour, no property

passed from the defendants to Clarke, and, therefore, he could convey no property to the plaintiffs. The objection was overruled, and the plaintiffs had a verdict. In *Gillett v. Hill*, 2 C. & M. 580, the defendant, a wharfinger, accepted an order made by one of their customers, in favor of the plaintiffs, for twenty sacks of flour. In trover it was contended that no specific sacks having been selected and appropriated by the defendants, no property vested in the vendee, and trover was not maintainable. The court held the action was well brought. In *Knights v. Wiffin*, Law Rep. 5 Q. B. 660, the defendant having a quantity of barley in sacks lying in his granary, sold eighty quarters to M. No particular sacks were appropriated to M., but the barley remained at the granary, subject to his orders. M. sold sixty quarters to the plaintiff, who paid for them, and received a delivery order, which was presented and accepted by the defendant. On refusal by the defendant to deliver the sixty quarters, the plaintiff was allowed to recover their value in trover. In *Farmaloe v. Bain*, 1 C. P. Div. 445, the defendants sold B. & Co. one hundred tons of zinc, to be taken from a quantity defendants had on their wharf. The plaintiffs bought of B. & Co. and paid for fifty tons of the zinc. No separation was made of either the one hundred tons originally purchased by B. & Co., or of the fifty tons bought by the plaintiffs. The action was in trover and detainee for fifty tons of zinc, and no point was made by counsel or court that a separation of the goods sued for had not been made from the gross bulk. The case resulted in favor of the defendants on the ground that they were unpaid vendors, and that they did not intend to part with their property without payment for it.

These cases cited, it is true, were against defendants who were treated as mere custodians of the property, and the right to maintain the action was put on the ground of estoppel. The English courts make a distinction between this class of cases and actions directly between the vendor and purchaser. But manifestly this distinction is in semblance only, and not in substance.

In each of the cases above cited, except *Gillett v. Hill*, the defendant was the original vendor, and no separation of the goods had been made as between him and his vendee, and the acceptance of a delivery order created no other contract than that in force between him and his vendee to hold for the benefit of the sub-vendee a certain designated quantity of goods. Acceptance of the delivery order might estop a defendant from denying that he had

that quantity of goods in his custody, subject to the order of the person signing the delivery order. But if there be a rule of law which overrules the intentions of parties, and forbids property passing under a contract of sale, unless the quantity sold be separated from the larger mass, it is difficult to perceive why it should not produce the same result between the original vendor and the holder of a delivery order, who in virtue thereof succeeds only to the rights of the original vendee, as it would between the parties to the original contract of sale.

Nor will the fact that a defendant stands in the position of being regarded as a mere custodian of the property, materially alter the situation of the parties; for it is well settled that a vendor may become the bailee of his vendee, and the custodian, for his benefit, of the property sold, if the parties so intend: *Marvin v. Wallis*, 6 E. & B. 726; *Beaumont v. Brengeri*, 5 C. B. 301; *Castle v. Swarder*, 6 H. & N. 828.

While the English courts adhere to the rule that, as between vendor and purchaser, separation of the quantity sold from a larger bulk, identical in kind and quality, is necessary, before the title will pass, how slight and unimportant a circumstance will take the transaction out of the operation of the rule, is shown by *Aldridge v. Johnson*, *supra*.

There the plaintiff bought of one K. one hundred out of two hundred quarters of barley, which plaintiff had seen in bulk and approved, and he paid part of the price. It was agreed that the plaintiff should send sacks for the barley, and that K. should fill the sacks, and take them to a railway station to be forwarded to the plaintiff. The plaintiff sent sacks only for part of the barley; K. filled these, but did not deliver them; and in a few days he turned the barley out of the sacks, on the heap from which it was taken, so as to be undistinguishable from the rest of the heap, and became bankrupt. The plaintiff tendered to the assignee in bankruptcy the balance of the purchase-money, and demanded the two hundred quarters of barley, and, on a refusal to deliver them, sued him in trover. It was held that he was entitled to recover for the portion put in the sacks by K., but for the residue he was without remedy. It did not appear in the case that the plaintiff, in fact, knew that a portion of the barley had been put in the sacks, and therefore he could not actually have assented to the selection that was made; and the assent of the vendee to the specific appropri-

ation was regarded, in *Campbell v. Mersey Docks*, 14 C. B. N. S. 412, as necessary, when such an appropriation is needed to transfer the title. Furthermore, when the demand was made on the assignee in bankruptcy, which laid the foundation for the action, the barley lay in the heap, and the part K. had put in the sacks was not distinguishable from the rest. If, therefore, the defendant had complied with the demand so far as the court held that he should have complied, he could only have done so by separating from the heap as much in quantity as the bankrupt had measured up—a process he could have as readily performed in relation to the full quantity of the barley covered by the contract. A comparison of the facts in evidence with the result that was reached, will show that the rights of the parties were disposed of upon a mere formality.

In the American courts, the cases on this subject are quite conflicting. Many of them are cited and examined by Mr. Holmes, in his notes to 2 Kent (12th ed.) 492, 590, and more particularly in his article in 6 Am. Law Rev. 450.

In Virginia, New York, Connecticut and Maine, the courts have held the broad doctrine, without qualification, that on a contract of sale of a certain quantity, from a larger bulk, uniform in kind and quality, the property will pass, though there be no separation of the quantity sold, if such be the intention of parties, and that no rule of law will overrule such intention, if it be *otherwise clearly expressed*: *Pheasants v. Pendleton*, 6 Rand. 473; *Kimberly v. Patchin*, 19 N. Y. 330; *Russel v. Carrington*, 42 N. Y. 118; *Chapman v. Shephard*, 89 Conn. 413; *Waldron v. Chase*, 37 Maine 414.

Kimberly v. Patchin is a leading case. It was there held, that upon a sale of a specified quantity of grain, the separation from a mass, indistinguishable in quality or value, in which it was included, was not necessary to pass the title, when the intention to do so was clearly *manifested*. But it is otherwise when the articles composing the mass are of different qualities and values, making not merely separation, but selection necessary: *Chapman v. Shephard*.

In *Waldron v. Chase* it was decided that where the owner of a large quantity of corn in bulk, sold a certain number of bushels, and received his pay, and the vendee took part away with him, the property in all the corn vested in the vendee, although it was not measured or separated from the heap.

This case was not overruled by *Morrison v. Dwigley*, 63 Maine 533, but was distinguished on the ground that in the latter case the vendor had not received his pay, and it was not to be presumed that he intended to part with his title without payment of the contract price.

The doctrine held in these cases, it seems to me, is founded on good sense and correct legal principles. The rule that the property in goods will pass by the contract of sale, if such be the intention of the parties, is of the utmost importance in the transaction of the business of the country, and it ought not to be qualified by exceptions and restrictions which do not arise from the substantial interests of the parties.

In this case the sale in all material respects was complete.

The corn had been inspected and approved, and the price agreed on and paid. All these things had been done before the levy of the execution. The property had been left with the vendor for the purchaser's convenience.

Nothing was left undone but measuring out the designated quantity from a bulk identical in kind and value, and a delivery to the vendee. That was done after the levy, and before suit brought; and there is no pretence that it was unfairly done.

The defendant by his purchase and the payment of the price, acquired equitable rights that ought, if possible, to be protected; and it is the policy of the law to protect interests acquired for a valuable consideration in good faith against the claims of execution creditors. In trover property is involved only so far as determines the form of the action and the damages recoverable. The defence was a meritorious one, and no legal principle is in the way of permitting it to be made, if in fact the parties intended that the property should pass.

That question should have been submitted to the jury, and for that reason the judgment should be reversed.

The question raised by the principal case is so squarely met by the New Jersey Court of Errors, in the learned opinion above given, that, for the present, it must cease to be regarded as a question in that state. Whether other courts shall, in their wisdom, affirm it or dissent from it, they will not fail to notice it; and thus, in any view, it is likely to

be an important decision upon a most important question under the contract of sale.

The question, reduced to its simplest form, is this : When a specified quantity, *ex* a bulk of uniform kind and value, is sold, and paid for and left by the purchaser, undistinguished from the bulk in the seller's possession, who afterwards

separates the part sold from the bulk, does the title to the part pass to the buyer at the time of the sale and payment, or at the time of its separation from the bulk ?

The principal case decides that, under circumstances such as these, separation of the specified quantity sold is not necessary to pass title, which passes at the time of sale and payment, and while the part is undistinguished from the bulk, if such were the intention of the parties. The opinion of the court, delivered by *DEPUÉ, J.*, is an able defence of this conclusion.

The line of reasoning pursued by the Court of Errors, in arriving at this conclusion, is briefly this : It is a principle of law that, in sales of chattels, title passes according to the intention of the parties to the contract of sale. Intention is a matter for the jury to infer from the facts of each case. Facts going to show intention should be left to the jury, unless some rule of law warrants withholding them. Where the subject of sale is part of a uniform bulk, from which it is in nowise distinguished, title to the part sold would, under the principles just stated, pass according to the intention of the parties ; and facts going to show intention should be submitted to the jury, unless there be a rule of law applying to this class of cases to take them out of the operation of this principle. There is a rule of law, that where a part is sold out of a bulk, separation or some appropriation of the part to the contract is necessary, before title to the part passes to the buyer. It is the opinion of this court, however, that this rule should apply where selection is of benefit to the buyer or seller ; but where the bulk is uniform, it is the judgment of this court that this rule of law, which requires severance, should not and does not apply. Hence, in the present case, this rule not applying, there is nothing in the way to prevent the passage of title in the part sold before it is distin-

guished from the bulk, if the parties to the sale so intended. The inspection and approval of the bulk and the payment of the price, in this case, are circumstances from which a jury might have inferred an intention to pass title before separation of the part from the bulk, which by agreement was postponed. If the jury found such intention, there is no rule of law to prevent title passing to the purchaser while the subject of sale is undistinguished from the bulk in the possession of the seller, and a levy made on the bulk would not bind the part so sold. Hence, as there were facts in this case from which a jury might have inferred an intention to pass title, and as there is no legal rule in the way of permitting it which the intention of the parties would not override, the courts below erred in holding that the facts going to prove intention should not be submitted to the jury.

The Supreme Court had, upon the same state of the case, and with the same legal propositions before it, reached an exactly opposite conclusion. The opinion of this latter court was delivered by *SCUDDER, J.*, and reported in full in this journal for January 1878.

The line of reasoning pursued by the Supreme Court was this : It is a principle of law that in sales of chattels title passes according to the intention of the parties. The facts from which such intention may be inferred should in all cases be given to the jury, unless there be a rule of law, which, upon the admitted facts, applies to a given case, to take it out of the operation of this principle of interest. In sales of a part out of a bulk, there is such a rule of law. The rule is, that where there is a sale of a specified quantity *ex a* bulk, title to the part sold does not pass to the buyer until some appropriation of the part to the contract has been made. This rule is, in its nature and operation, superior to and irrespective of the intention of the parties. From

admitted facts, this case comes within this rule : hence, as the intention of the parties could in no wise affect the operation of this rule, the court below did not err in withholding from the jury, facts as to intention.

From a comparison of these two opinions, as well as from the cases cited, it is apparent that the question turns upon the nature of this rule of law, of which such diverse views are held. This rule, which we shall for brevity's sake, call the Rule of Ascertainment, may be broadly stated to be, that in sales of a part *ex a bulk*, title does not pass until the part has been ascertained, *i. e.* reduced to certainty.

The opinions agree, that the whole difficulty, in the principal case, arises from the collision, which occurs between the operation of this rule and the application of the principle, that title passes according to the intention of the parties, which we may call the principle of intent. The diametrically opposite conclusions reached by the two courts, result from the opposite views held of the nature of this rule of ascertainment.

The Supreme Court regard this rule as an outgrowth and expression of those fundamental laws upon which the contract of sale is based. Hence, to be in its nature superior to and in its operation irrespective of the intention of the parties. The Court of Errors, on the other hand, regard it as a mere artificial rule of law, which a progressive court should lay aside when commercial convenience or substantial justice may, in the opinion of the court, require it. The question then, is practically reduced to this inquiry, *viz.*, what is the nature of this rule of ascertainment?

In considering this question, it will be necessary to recur for a moment to the fundamental principles of the executed contract of sale, the essential prin-

ciples of which are contained in Blackstone's definition, that "sale is a transferring of goods for money," and its most primitive illustration would be a seller with an article in his hand, and a buyer with the price in his, simultaneously exchanging the one for the other, in which ideal sale property and possession never part company, and delivery is contemporaneous with the execution of the contract. However unsuited this to commercial convenience, it is the true form of the executed contract of sale. Nor are the essential features of this normal sale ever departed from, in contemplation of law. One of these essential features is the execution of the sale by handing the article to the buyer. From the significance of this act the doctrine of delivery arises, and to it we may trace the rule of law now under consideration.

In this normal sale, the seller hands the article to the buyer. Thus it will be noticed, the subject of sale is ascertained before property passed; for the handing is *per se* an ascertainment or reduction to certainty. If he hold out two articles, and either he or the buyer select one, the subject of sale would thus have been ascertained before property passed. It is equally evident that no specific title to either article could pass until there had been a selection, or at least a unanimity as to what article it was that constituted the subject of sale. Not only because mutual intention, without unanimity, is a flat contradiction, but also, because delivery is that which executes the sale; and this selection, mental though it be, is a necessary preliminary to any method of delivery. For delivery is a twofold conception, it is a selection and a physical transfer of the thing selected. And any means by which this selection or unanimity could be either attained or communicated, whether by word, look, act or even thought of the mind directed to a specific article would amount to a selection

or appropriation of that article, upon which the physical transfer could operate. It is an aphorism that we can do no determinate act without its appropriate antecedent mental condition. Hence, by a law fundamental in the nature of things, selection must precede the delivery of the thing selected, and that is all the rule of ascertainment requires; a rule not altered, that we can see, by the fact that the selection is to be made from a bulk uniform in kind and value. It is evident then that a sale in order to be executed by delivery must have, as an essential feature, this selection of the thing to be delivered; must, in other words, conform to the rule under consideration, because this rule is in its nature and reason based on fundamental laws as unvarying in their application as the law of gravitation.

But it may be said, that while the rule thus applies in cases where title passes by actual delivery, to necessitate this ascertainment of the exact subject of sale, that "constructive delivery" is a legal substitute for this, and does not require the same degree of certainty. A substitute of what? Constructive delivery is the substitution of a symbolical act for the physical act of transfer of possession under the contract of sale, and as a substitute it must take the place of its principal, viz.: of the physical transfer of possession. But the delivery which passes title consists, as we have seen, of a selection and a physical transfer of the thing selected. If now we put the symbolical act in the place of the physical act, we shall have a selection and a symbolical act. The substitution in nowise waives the selection, which is preliminary and independent of the method of transfer. Transfer of title by constructive delivery then in no view obviates the necessity of the selection upon which the transfer is predicated, which is, in the nature of things, just as essential a preliminary in the one case as in the other. The legal permission extending

no further than the substitution of a method of manifesting, by symbolic act, a unanimity or selection previously reached. This selection is not the result of either the physical or of the symbolic act, but is attained by that selective process which enters of necessity into any method of delivery, actual or constructive, real or symbolic, to all modes of executing the contract of sale—to every method by which, in contemplation of law, title passes.

The conclusion, then, to which these elementary considerations would seem to point, is, that the view of this rule held by the courts below was not without a certain foundation in law and reason, namely, that the nature of this rule is such, that no sale can be executed, so as to pass title to the subject of sale, unless there be either a physical transfer of the subject of sale, or a legal substitute to the same intent, either of which methods is equally and necessarily predicated upon a selection or unanimity as to the subject of sale, which is all that the rule, in its essential nature, requires.

If, now, the subject of sale be "a specified quantity, *ex a* bulk, uniform in kind and value," that circumstance can have no influence upon the operation of a law of this nature, of a law which has no reference to kind, or value, or to any attribute of the subject of sale, but regards solely the fundamental doctrine that the selection, upon which the passage of title is based, must, by a law of mind, necessarily precede the passage of title. If such be the nature of this rule, the position of the Supreme Court below, that the intentions of the parties could not prevail against it, is evidently a logical sequence, the transfer of title being a matter of law, not a matter of contract. Contracts can only form personal obligations between the contracting parties. Law executes all contracts. The contract cannot, of itself, produce this effect; still less is it the part of any

contract to dictate what, for its purposes, shall be a transfer of title, in opposition to legal rules, or in disregard of legal requirements.

To argue that, because intention makes the contract, therefore it makes the *executed* contract, is clearly sophistical—is adding a value to one side only of an equation. Add to both sides, and no one can dispute the result, viz., that intention plus legal manifestation makes an executed contract; but in this legal manifestation, which executes the contract, is involved, as we have seen, the idea of the selection or ascertainment of the subject of sale; for how can parties legally manifest a mutual intention, which admittedly lacks unanimity on so vital a point as the very subject-matter of the contract?

Having now considered the nature and operation of this rule as held by the court below, we shall cite those authorities decided under it and which will be found to support the view taken. The rule, it will be borne in mind, is that where a specified quantity of goods out of a bulk is sold, the sale is incomplete and title does not pass until the part sold is identified or appropriated to the contract.

The rule is substantially agreed upon by civilians and common lawyers: Picot's Com. des Inst. Livre III., tit. 23, sec. 3; Digest 18, 1; Pothier Trait du contrat de vente, p. 4, n. 308; Code Napoleon, No. 1585; 2 Kent's Com. 496; Hilliard on Sales 135, sect. 1-5; Benjamin on Sales 304, s. 352, *et seq.*; Story on Sales 328, sect. 296, *et seq.*; Blackburn on Sales 20; 1 Parsons on Contracts 440, *et seq.*

Luke xiv., 19, "I have bought five yoke of oxen and I go to *prove* them." δοκιμάσαι (the word translated "prove"), means an approval or acceptance based on examination. A curious instance showing at once the prevalence of the rule and the importance attached to it, for the excuse is practically, "I have

bought the oxen but until I select them I get no title to them."

It is customary to divide the cases into 1, those which support the rule, and 2, those which are antagonistic to it; and these two classes are generally regarded as being directly conflicting. If, however, the nature and operation of the rule be as we have considered it, these two classes of decisions may be reconciled without violence to any essential requirement of the law, and the cases spoken of as conflicting by the court of error be reduced to something very like harmony.

The first class is composed of those cases which hold the straight doctrine that under the rule title to the part does not pass until the part has been reduced to certainty. This class should be subdivided into those in which this point is ruled without any foreign or incidental circumstances; and those in which such elements are introduced. The former speak no uncertain sound and need only to be cited, such are: *Repelye v. Mackie*, (1824) 6 Cowen 250; *Downer v. Thompson* (1841), 2 Hill 137; *White v. Wilks*, (1813) 5 Taunt. 176; *Austin v. Craven*, 4 Id. 644; *Scudder v. Worster*, 11 Cush. 575; *Aldridge v. Johnston*, (1857) 7 E. & B. 885; *Langton v. Higgins*, 4 Hurlst. & N. 402; *Keeler v. Goodwin*, (1873) 111 Mass. 490; *Haldeman v. Duncan*, (1865) 1 P. F. Smith 6; *Morrison v. Dingley*, (1874) 63 Me. 553; *Hutchinson v. Hunter* (1847), 7 Barr 140; *Golder v. Ogden*, 15 Penna. St. (3 Harris) 528; *Waldo v. Beecher*, 11 Ired. 609; *Merrill v. Hunnewell*, 13 Pick. 213; *Hires v. Hurff*, 39 N. J. 4.

The other division of those cases which support the rule comprises those in which the determination of price, kind or quality is incidental to the main point of the case. As the determination of these incidents is often a condition precedent to the execution of ordinary sales, it has been contended that these cases were not controlled strictly by the rule,

but by principles drawn from and equally applicable to sales of the entirety. An examination of the cases themselves, however, will not fail to show that in them the real question was not whether title passed before the price, &c., were determined, but whether it passed at all; the ascertainment of the part being not as a mere basis for the determination of the price, &c., but for the essential object of reaching that unanimity as to the subject of sale required by the rule. Such cases are: *Simmons v. Swift*, B. & C. 857 (1826); *Hanson v. Meyer*, 6 East 614 (1805); *Zagury v. Furnell*, 2 Camp. 240 (1810); *Ward v. Shaw*, 7 Wend. 404 (1831); *Fitch v. Lozee*, 15 Id. 221 (1836); *Wood v. McGee*, 7 Ohio 467 (1836); *Rugg v. Minett*, 11 East 209 (1809); *Wallace v. Breeds*, 13 Id. 522; *Gillett v. Hill*, 2 C. & M. 530; *Foot v. Marsh*, 51 N. Y. 288 (1873); *Bush v. Davis*, 2 M. & Selw. 398 (1814); *Shipley v. Davis*, 5 Taunt. 617 (1814); *Thompson v. Conover*, 31 N. J. 466 (1865); *Logan v. Le Mesurier*, 6 Moore Priv. C. Cases 116.

We may take this last case as a type of this class. *Logan v. Le Mesurier* was a case in which the buyer bought and paid for a raft of lumber, measuring "fifty thousand feet, more or less," with an agreement that, should it turn out more, the excess was to be paid for at 9½d. per foot. The raft was shipped, and totally destroyed. The question was, had title passed? The Court of Queen's Bench, at Montreal, decided that it had; but the Court of Appeals for Lower Canada reversed this judgment, and decided that title had not passed. The seller appealed to her Majesty in Council, where the decision of the Court of Appeals was affirmed by Lord BROUGHAM, after an exhaustive review of principles and authorities.

The second class is composed of those cases in which title was considered to have passed to the buyer before actual

separation of the part from the bulk. These are the cases spoken of as antagonistic to the rule of ascertainment, and relied upon by the court in the principal case. If, however, the view held by the court below, of the nature and effect of that rule, were founded on correct reasoning and on sound principles, these cases are not antagonistic to the rule, as claimed, but are instances in which the courts have, in the application of a rule of law, availed themselves of circumstances, clearly within limits compatible with the nature of the rule, to mitigate its seeming strictness. We have seen that the nature of this rule is such, that all that it demands, as an essential, is that a selection, or unanimity as to the subject of sale, shall have been reached, between the parties, upon which transfer of possession, actual or symbolic, could be predicated. In this view, the cases in question are clearly within the rule. In every case there was present a manifestation of just what the rule requires, viz., some act which indicates that a unanimity, as to the subject of sale, has been reached, upon which transfer could be based. Take the oft-cited case of *Whitehouse v. Frost*, which is a typical case. This was a sale of ten tons of oil, out of a bulk of forty tons, in the possession of a third party. The seller gave to the buyer a delivery order on the custodian for the ten tons, which was accepted. The court held that title to the ten tons passed to the buyer with the order and acceptance. But how is this antagonistic to the rule, as we understand it? The parties had arrived at a complete unanimity as to the subject of sale, and clearly manifested it. The selective process, so far as either party was concerned, was as complete as it ever could be, and the subject of sale had been reduced to a legal certainty, upon which transfer could be predicated, without the exercise, *de novo*, of the selective process, by either party. And this is the

test. It is this feature which, running through this class of cases, harmonizes them with the rule, and distinguishes them from the principal case. These cases are: *Whitchouse v. Frost*, 12 East 614 (1810); *Kimberly v. Patchin*, 19 N. Y. 330 (1859); *Cushing v. Breed*, 14 Allen 376 (1867); *Woodbury v. Coventry*, 2 H. & C. 164; *Knights v. Wiffin*, Law Rep. 5 Q. B. 660. It is customary to include, among these cases, several which have been repeatedly discriminated as having been decided upon entirely different questions.

Enough has been said to show that, in this view of the cases themselves, and in view of the further fact that they are immensely outnumbered and outweighed, they offer no obstacle to the operation of an established rule of law, even if such rule were, as the court consider it, an artificial rule of custom and convenience; while, if we adopt those views of the nature of that rule which seem to have been entertained by the court below, the rule will be found to harmonize all the cases—except *Hires v. Hurff*. C. G. G.

Supreme Court of Illinois.

J. A. CRAIN ET AL. v. RICHARD H. McGOON ET AL.

A tender after default does not discharge the lien of a mortgage, although sufficient in amount. Where a tender is made after the day it should be kept good.

A. executed a deed of trust in the nature of a mortgage to secure the payment of a promissory note for \$2000, made the same day, and payable one year from date, upon the order of B., more than a year afterwards.

A. tendered B. \$2000 in "greenbacks" and \$40 in gold, which was the full amount then due. The tender was refused and not thereafter kept good. *Held*, that the tender should have been kept good in order to discharge the mortgage.

ON the 10th of December 1855, one Martin, complainant's intestate, being indebted to McGoon, as evidenced by his promissory note of that date, payable one year after date, for \$2000, money loaned, with interest at the rate of ten per cent. per annum, executed his deed of trust, in the nature of a mortgage on certain real estate, to secure the payment thereof. Some payments of interest having been made, but the principal of the note, and a part of the interest remaining unpaid, on or about the 1st of March 1863, Martin tendered to McGoon, as the amount then due on the note, \$2000 in legal tender and \$40 in gold, which McGoon declined to accept.

Early in the year 1866 the trustee in the deed of trust, at the request of McGoon, advertised the property for sale, for the purpose of satisfying the amount claimed to be due on the note.

Thereupon, on the 27th of February 1866, appellants filed their bill to enjoin this sale, and for an account, &c. Answers were filed and replications thereto, and the court referred it to a jury to find:

1st. What was the amount due on the note March 1st 1863?

2d. Whether Martin made a tender at that time?

3d. Whether, if made, it was kept good?

The jury found: 1st. Amount due on the note March 1st 1863, \$2040. 2d. Tender made March 1st 1863, \$2040. 3d. Tender not kept good. Subsequent to this finding by the jury, McGoon filed his cross-bill, praying a decree of foreclosure of the deed of trust, and a sale of the property to satisfy the amount due. Answer was filed to the cross-bill, setting up in substance the same facts relied upon in the bill as ground for relief. The court, on final hearing, dissolved the injunction and found there was due McGoon on the note \$1311.25, for which foreclosure was decreed.

The opinion of the court was delivered by

SCHOLFIELD, C. J.—The principal grounds relied upon by appellants for reversing the decree are: 1st. That the tender made on the 1st of March 1863, discharged the mortgage, although the tender may not have been kept good. 2d. That the tender was kept good, and there should, therefore, have been no decree of foreclosure. *Kortright v. Cady*, 21 N. Y. 343; *Caruthers v. Humphreys*, 12 Mich. 270, and *Vanhusen v. Kanouse*, 13 Id., cited by appellant's counsel, sustain them in their first position. It is, however, conceded in those cases that the common law doctrine was different, and that it required a tender at the time the debt is due, technically termed the "law day," to discharge the mortgage, or an actual payment of the amount. The doctrine of the common law was that default in payment at the time and place stipulated, forfeited absolutely the estate of the mortgagor; the land was therefore taken away from him for ever: *Coke Littleton* 205 a. If, however, the mortgagor made a tender of the debt due at the stipulated time and place, and the mortgagee refused to receive it, the mortgage was discharged: *Coke Littleton* 207 a. But a convenient time before sunset on the day of payment, was the last time given to make the tender: *Coke Littleton* 206 b.

Courts of equity acting upon their general principles, in order to prevent injustice to the mortgagor, resulting from the common-law rule, interposed and established the doctrine that the mortgage was but a security for the debt; that the mortgagee held the estate, although forfeited at law, as a trust; and that "the mortgagor had an equity of redemption which he might enforce against

the mortgagee, as he could any other trust, if he applied within a reasonable time to redeem, and offered a full payment of the debt and of all equitable charges: 5 Story's Eq. Jur. § 1013.

It will be observed that it was the same rigid and technical common-law rule which forfeited the estate of the mortgagor for non-payment of the debt at the stipulated time and place, and discharged the mortgage by a tender at the stipulated time and place, the literal enforcement of the terms of the contract without regard to circumstances. We fail to appreciate why a court of equity, while interposing its authority to mitigate the rigor of the common-law rule against the mortgagor, should at the same time extend and make more rigorous the rule against the mortgagee. We do not perceive how this can be said to be in pursuance of the natural principles of justice. If a tender is made but not accepted, and is kept good, it is plainly right that the mortgagee should have only the tender. The mortgagor has been deprived of the use of his money, and the mortgagee has had ample time to reflect upon his rights, and has been at liberty to have them, whenever he would, by the acceptance of the tender. But when the tender is not kept good, the mortgagor has the use of the money and the mortgagee, however ill advised he may have been at the time of tender, has no opportunity for revising and reconsidering his judgment, and thereafter accepting the money tendered.

Where the tender is made at the day, it is made at the time the parties, by their contract, agreed payment should be made, the mortgagee may then reasonably be presumed to have anticipated payment and to have prepared himself to state the account accurately. But a tender after that time may be on one day as well as on another, after the lapse of years as well as of days, and without any previous notice of the time. In very many cases after the lapse of a considerable time, where numerous payments have been made, and the parties through ignorance or carelessness have omitted to make entries, or to execute and preserve written receipts thereof; or where the mortgagee has been in possession of the mortgaged property, and is under obligations to account for rents and profits, after deducting taxes and necessary repairs, and the memory is uncertain and confused, it would be very difficult to determine at once whether the amount tendered is equal to the amount actually due.

The first judgment on the question might be very inaccurate and

yet very honest, and it would not be until by reflection long afterwards, that the inaccuracy would be detected. When it is reflected that no serious hardship is imposed on a party making a tender by requiring him to keep it good, it would seem clearly unjust, under circumstances like those alluded to, to require a party to whom a tender is made, after the day of payment has passed, to elect at once to accept or reject it, at the peril of losing his security, if he misjudges as to his rights. An exceptional instance of injustice that would result from such a rule is found in facts disclosed by this record.

The debt here was due December 10th 1856, and had a tender then been made, it must have been in coin, and there is not the slightest grounds for supposing that it would have been rejected. The tender made March 1st 1863, was rejected because it was not in gold, but was in United States legal tender notes. At the December term 1869, of the Supreme Court of the United States, in *Hepburn v. Griswold*, 8 Wallace 603, a majority of the court sustained the position of McGoon in rejecting the tender, because it was not in gold, and had the present case been decided before that case was overruled, the decision must have been in favor of McGoon, on that ground: *McGoon et al. v. Shirk*, 54 Ill. 408. Or it would seem had the tender been made after the decision in that case, and before the decision in *Knox v. Lee*, 1 Wallace 457, overruling it, it must have been held the legal tender was insufficient for the cause assigned by McGoon: *Harris v. Jix et al.*, 56 N. Y. 421. It could hardly seem otherwise than harsh and unjust to discharge the mortgage simply because McGoon judged with regard to the sufficiency of the tender, as did the Supreme Court of the United States in the first decision, and not as in its last.

The policy of courts of equity is against forfeitures, and in this state to discharge the mortgage, would be in very many instances in effect to forfeit the debt. We think the preferable rule is, where the tender is made after the day the debt secured by the mortgage is due, to require that it shall be kept good in order that it may operate to discharge the mortgage. This is in harmony with *Maywood v. Hunt*, 5 Pickering 240; *Smith v. Kelly*, 27 Maine 237; *Merritt v. Lambert*, 7 Paige 344.

It was Martin's duty when his tender was rejected, to have kept the money safely, and been ready to pay it when McGoon should consent to accept it: *Stow v. Russell et al.*, 36 Ill. 33-34. The

finding of the jury on this question is, in our opinion, authorized by the evidence. Chancellor Martin, Jr., by whom the tender was made, says he deposited the money to his credit, in a bank, and endorsed and delivered the certificate thereof to his father, the mortgagor. It appears \$800 of this was drawn out April 4th 1863, and it is not shown that other money was kept ready to supply its place. Henry S. McGoon testifies that in May 1865, he called upon Crain, the administrator, for the money due on the note, and that then Crain told him he could not pay it, but it must be probated against the estate, and paid in its order with other claims.

Crain, to some extent, contradicts him, but admits that he advised him on the subject of probating the claim, and that he did not offer to then pay him or say anything about the tender. Without discussing the relative weight of the testimony of these witnesses, and without discrediting Crain, it is sufficient to say even his evidence alone is not sufficient to clearly establish that the tender was then kept good. Henry S. McGoon, he was informed, was the assignee of the note. He was also informed that his business then was to get the money due upon it. If it had all the time been ready for him, and was then ready for him, he should have so notified him. The objections to the instructions to the jury are unimportant. Their verdict was advisory only to the court, and since we are satisfied with the result, it is unimportant by what process it was reached.

The decree is affirmed.

In considering the operation of a tender care should be taken to distinguish between the mortgage and the mortgage debt. The mortgage is instantly and finally discharged, but the obligation of the debt is not impaired: *Coke Litt.* 209 a; *Bac. Ab.* "Tender," F. 330. It is essential therefore both at law and in equity that a tender should be kept good in order to stay interest and save costs: *Hume v. Peplow*, 8 East 168; *Wolcott v. Van Santvoord*, 17 John. 253; *Gyles v. Hall*, 2 P. Wms. 378; *Harmer v. Priestly*, 16 Beav. 569; *Columbia Build. Ass. v. Crump et al.*, 42 Md. 194; *Shields v. Lozear*, 34 N. J. 504.

At common law a mortgage was regarded as an estate upon condition. A

tender therefore upon the "law day" necessarily divested the mortgage, because it fully satisfied the condition: *Coke Litt.* 209 b; *Com. Dig.* "Condition," L. 4; *Bac. Ab.* "Tender," F. 330; 4 Kent Com. *193; *Shields v. Lozear*, *supra*.

But a tender upon a day subsequent was without effect, because the condition was then discharged, and the estate absolutely vested in the mortgagee by reason of the forfeiture. Under such circumstances, the Statute of Frauds would not permit either tender or payment to divest an absolute estate, without the aid of a legal conveyance: *Moywood v. Hunt*, 5 Pick. 240; *Currier v. Gale*, 9 Allen 522.

In equity, however, the mortgagor

could still be relieved from the consequences of the legal forfeiture. Upon payment of the debt the mortgagee was converted into a trustee for the mortgagor, but a mere tender did not have this effect: *Adams's Eq.* *115; *Shields v. Lozear, supra.*

Thus in the case of *Postlethwaite v. Blythe*, 2 Swan. *256, a bill was filed to compel payment, where estates in Jamaica had been conveyed to trustees, in trust, *inter alia*, to raise money for the payment of a debt due to the plaintiff. By their answer, the defendants, the trustees, disputed the amount of the plaintiff's claim, and having paid into court a sum of 2661*l.* 2*s.* 3*d.*, they moved before the Vice Chancellor, that upon payment into court of the further sum of 4034*l.* 14*s.* 3*d.* (amounting with the former sum to 6695*l.* 13*s.* 3*d.*, the utmost extent of the debt claimed), the plaintiff might release the estates. The Vice Chancellor made the order, on payment into court of an additional sum for securing the plaintiff's costs. But upon a subsequent motion the Chancellor (ELDON) discharged this order. "I take it," he said, "to be contrary to the whole course of proceeding in this court, to compel a creditor to part with his security till he has received his money. Nothing but consent can authorize me to take the estate from the plaintiff before payment." Upon this principle therefore it was held that a tender would not discharge the lien of a solicitor, although the money had been paid into court: *Richards v. Platel*, Cr. & Phil. 79; s. c., 18 Eng. Ch. R. 79.

At law, however, a tender seems to have been accorded a more extended operation in relation to liens than in equity. "It is a general rule of law," said Commissioner DWIGHT (*Tiffany v. St. John*, 65 N. Y. 318), "that where a person holds a lien upon property, a tender by the owner of the property of the amount of the lien will discharge it."
* * *

The principle governing the subject is, that tender is equivalent to payment as to all things which are incidental and accessorial to the debt."

Neither does the rule seem to vary, whether the lien is created by the act of the parties: *Coggs v. Bernard*, 1 Sm. Lead. Cas. *291; *Anon.*, 2 Salk. 522; *Ratcliff v. Davies*, Cro. Jac. 244; Com. Dig. "Mort." A; *Ball v. Stanley*, 5 Yerg. (Tenn.) 199; *Moynahan v. Moore*, 9 Mich. 9; or through the operation of law: *Six Carpenters' Case*, 8 Coke 146 a; *Hunter v. LeConte*, 6 Cow. 728; *Tiffany v. St. John, supra.* Nor does the rule seem to be otherwise although the stipulated day of payment has passed: Story on Bail. § 346; 3 Par. on Cont., 5th ed. 274; *Walter v. Smith*, 5 B. & Ald. 439; *Cortelyou v. Lansing*, 2 Cain. Cas. in Error 200.

In view of this conflict, it is natural that courts of law should be somewhat embarrassed when, under the influence of equitable doctrines, they come to deal with a mortgage as a security rather than an estate. It is manifest, upon principle at least, that if it be once conceded that payment will discharge the mortgage even after default a tender cannot be denied this effect, upon the ground that the mortgage interest still continues within the purview of the Statute of Frauds: *Edwards v. Farmers' Fire and Life Ins. Co.* 21 Wend. 467; *McMillan v. Richards*, 9 Cal. 365-411. The real question would then seem to be whether legal or equitable principles shall prevail in dealing with what is now practically regarded as a mere lien or pledge for the security of a debt.

In *Shields v. Lozear, supra*, the more conservative position was taken that a tender after default would not discharge the lien of a mortgage. Said DEPUZ, J., "When a court of law undertakes to deal with this equitable estate, it must do so upon principles of equity and keep in view the relief which would be afforded in equity and protect

the rights of the parties accordingly. The recognition of this equitable estate has been obtained in courts of law by the fiction of regarding the mortgagee after his debt is satisfied, as a trustee of the legal estate for the mortgagor. Until the debt is paid, the legal seizure of the mortgagee is not a mere formal title and no trust will be raised for the benefit of the mortgagor until the purpose for which the mortgage was made is answered."

But after a long and earnest conflict, *Jackson v. Crafts*, 18 Johns. 110; *Merritt v. Lambert*, 7 Paige 344; *Edwards v. Farmers' Fire Ins. and Loan Co.*, 21 Wend. 467; *Farmers' Fire Ins. and Loan Co. v. Edwards*, 26 Id. 541; *Arnot v. Post*, 6 Hill 65; *Post v. Arnot*, 2 Denio 344, the New York courts reached a contrary conclusion in the leading case of *Kortright v. Cady*, 21 N. Y. 343. Said COMSTOCK, C. J.: "The proposition that a tender of the money due on a mortgage, made at any time before a foreclosure, discharges the lien, is the logical result of premises which are admitted to be true. These are, that the mortgagor has the same right after as before a default to pay his debt, and so clear his estate from the encumbrance; and that payment being actually made, the lien thereby becomes extinct. We have, then, only to apply an admitted principle in the law of tender, which is, that tender is equivalent to payment as to all things which are incidental and accessory to the debt. The creditor, by refusing to accept, does not forfeit his right to the very thing tendered, but he does lose all collateral benefits or securities: 3 Johns. Cas. 243; 12 Johns. 274; 6 Wend. 22; 6 Cowen 728; *Coggs v. Bernard*, 2 Ld. Raym. 916. Thus, after the tender of a money debt, followed by payment into court, interest and costs cannot be recovered. The instantaneous effect is to discharge any collateral lien, as a pledge of goods or the right of distress. It is not denied that the same principle ap-

plies to a mortgage, if the tender be made at the very time the money is due. If the creditor refuses, he justly loses his security. It is impossible to hold otherwise, although the tender be made afterwards, unless we also say that the mortgage, which was before a mere security, becomes a freehold estate by reason of the default." And see *Frost v. Yonkers Savings Bank*, 70 N. Y. 553; *Caruthers v. Humphrey*, 12 Mich. 270; *Van Huse v. Kanouse*, 13 Id. 303; *Moore v. Cord*, 14 Wis. *213; *Breitenbach v. Turner*, 18 Wis. *140.

In California, however, the courts declined to follow the lead of the New York cases, although, it is conceded in that state, that a mortgage passes no estate in the land: *McMillan v. Richards*, 9 Cal. 345. "The debtor," said BALDWIN, J., in *Pene v. Castro*, 14 Cal. 519, "is as much in default for not paying when the debt is due as the creditor is in default for not receiving the money afterward when offered. It would be very harsh to hold that the debt is lost, the general effect of losing the security, by a mere refusal at a particular moment to receive it, that refusal induced, too, as it might be, by a variety of circumstances morally excusing it, or at least, not greatly violative of any positive duty, and productive of little or no injury to any one." But, as was observed by SAWYER, J., in *Hayes v. Joseph*, 26 Cal. 535, 546: "To continue a mortgage on foot after a tender might tie up the mortgaged property and greatly embarrass the mortgagor in its full enjoyment, by preventing a sale or mortgage for other purposes, and thus great damage might result to him." See also *Muhler v. Newbaur et al.*, 32 Cal. 170; *Ketchum v. Crippen*, 37 Id. 223.

The question, however, was finally set at rest in that state, and the reasoning of *Pene v. Castro*, *supra*, finally affirmed in the case of *Himmelmann v. Fitzpatrick*, 50 Cal. 650. It should be noticed, however, that a tender in order to discharge a security should be of the full amount

due; *Graham v. Linden*, 50 N. Y. 547; *Bigelow v. Young*, 30 Ga. 121, and that the unconditional acceptance by the creditor does not at least discharge the debt. "It is settled by many authorities," said BENNETT, J. (*Miller v. Holden*, 18 Vt. 337), "that if a tender is clogged with any conditions, so that the taking of the money tendered would constitute an admission by the party that it is in full of his claim, he may for this cause reject the tender as being invalid. * * * The reason is, that the party making the tender has not a right to insist upon the claimant's being concluded from claiming more than what was tendered, by force of any implied admission, growing out of the reception of the money, that the sum tendered was the amount due to him and that he received it in satisfaction of his claim." *Strong v. Harvey*, 3 Bing. 304; s. c., 11 Eng. Com. Law 153; *Jennings v. Major*, 8 C. & P. 61; s. c., 34 Eng. Com. Law 610; *Hastings v. Thorley*, 8 C. & P. 573; s. c., 34 Eng. Com. Law 899; *Wells v. Robb*, 9 Bush 32; *Storey v. Krewson et al.*, 55 Ind. 397; *Wood v. Hitchcock*, 20 Wend. 48; 56 Ill. 453; 3 Phil. on Ev. 378.

It was therefore held, in the New York cases, that an acceptance of a tender, when the sum was insufficient, would only discharge the mortgage lien *pro tanto*. "It is said," remarked COMSTOCK, C. J., "that mortgagees will be put to great inconvenience, if, at any period, however distant from the time of maturity, they must know the amount of the debt and accept a tender on peril of losing their security. The force of this argument is not perceived. As a tender must be unqualified by any conditions, there can never be any good reason for not accepting the sum offered, whether it be offered when it is due or afterwards. By accepting the tender, the creditor loses nothing and incurs no hazard. If the sum be insufficient, the security remains. It is only by refusing, that any inconvenience

can possibly arise. But, whatever may be the consequences of refusal, the creditor may partly charge them to his own folly." *Kortright v. Cady*, *supra*.

In *Hayward v. Munger*, 14 Iowa 516, however, it was doubted whether the creditor is not precluded from recovering, when he does not object to the amount at the time it is tendered. And see *Graves v. McFarlane*, 2 Cold. (Tenn.) 167.

The strictness of the New York rule was therefore somewhat modified in its application at least, by CHRISTIANCY, J., in *Potts v. Pluisted*, 30 Mich. 149. "In view," he said "of the serious consequences to the holder of a mortgage upon the refusal of a tender, consequences which may often amount to the absolute loss of the entire debt, and in view of the strong temptation which must exist to continue merely colorable or sham tenders, not intended in good faith, the evidence should be so full, clear and satisfactory, as to leave no reasonable doubt that the tender was so made, that the holder must have understood it at the time to be a present, absolute and unconditional tender, intended to be in full payment and extinguishment of the mortgage, and not dependent upon his first executing a receipt or discharge, or any other contingency. And the holder must in every case have a reasonable opportunity to look over the mortgage and accompanying papers, to calculate and ascertain the amount due; and if such papers are not present, he must be allowed a reasonable time to get them and make the calculation. He cannot be bound under the penalty or at the hazard of losing his entire debt, to carry at all times, in his head, the precise amount due on any particular day." *Proctor v. Robinson*, 35 Mich. 284-294; *Frost v. Yonkers Savings Bank*, *supra*; *Harris v. Jen*, 55 N. Y. 421. See for a further discussion of this subject, 2 Jones on Mortgages, §§ 886 to § 903, both inclusive.

J. P. B.

Supreme Court of Wisconsin.

HENRY SPIERING v. JULIUS H. ANDRAE.

Words falsely and maliciously charging a public officer with ignorance and want of capacity to perform properly the duties of an office of profit, and directly tending to prejudice him therein, are actionable *per se*.

This was an action for slander. The plaintiff alleged in his complaint that at the time the alleged slanderous words were spoken by the defendant, he was, and for many years previous thereto had been, a justice of the peace, and acted as such in the village of Mayville, in the county of Dodge; that the defendant, in a public speech in said village, at a public meeting, in the presence and hearing of a great number of persons, in speaking of the plaintiff as said justice of the peace, maliciously spoke the false and defamatory words following: "The reason I did not take out my second papers was that I did not want to sit as a juror before such a d——d fool of a justice." No special damage was alleged in the complaint. The defendant answered, admitting the speech, but alleged that the words were not spoken of or concerning the plaintiff, and denies that he used the words "such a d——d fool," but that the words used were "a d——d fool of a justice." At the trial, the defendant objected to the introduction of any evidence on the part of the plaintiff, for the reason, that the words set out in the complaint were not actionable. The court sustained the objection, and ordered judgment of nonsuit, with costs, to be entered against the plaintiff. The plaintiff excepted, and afterwards moved for a new trial, which was also denied, and the plaintiff excepted. Judgment was rendered against the plaintiff.

The opinion of the court was delivered by

TAYLOR, J.—The only question is, whether the words set out in the complaint are actionable *per se*. The complaint alleges that the words were spoken of the plaintiff as a justice of the peace, and we think this claim is sustained by the allegations of the complaint. The defendant does not simply say of the plaintiff that he is "a d——d fool," but that he "did not want to sit as a juror before such a d——d fool of a justice." It is clear that the defendant meant to be understood by this language that he considered the plaintiff an unfit person to exercise the duties of a justice of the peace, on account of his ignorance and incapacity,

and that the defendant purposely abstained from becoming a citizen of the United States, that he might not be compelled to perform the duties of a juror in a court held by such a fool.

Starkie says, "Words are actionable without proof of special damage, which directly tend to the prejudice of any one in his office, profession, trade or business:" Starkie on Slander 110. In *Lansing v. Carpenter*, 9 Wis. 541, it is held that words spoken of an officer, which diminish public confidence in his official integrity, and thus injure him in the business of his office, are actionable. In *Gottbehuert v. Hubachek*, 36 Wis. 515, the same rule is repeated. The present chief justice, in the opinion, says: "We take it to be an elementary rule, that 'words are actionable which directly tend to the prejudice of any one in his office, profession, trade or business.' " That was an action brought for charging the chief engineer of the fire department of Racine with being drunk at a fire which it was his duty to extinguish. The case of *Weil v. Altenhofen*, 26 Wis. 708, is not in conflict with these decisions. In that case the words were not spoken of the plaintiff in his profession or business.

The words spoken by the defendant at bar, clearly and in most contemptuous terms charge the plaintiff with a want of capacity to perform properly the duties of his office, and directly tend to prejudice him therein. There are some cases which hold that charging an officer with mere ignorance and want of capacity to perform the duties of his office are not actionable *per se*. Such was the opinion of Justice NOTT, who delivered the opinion in the case of *Mayrant v. Richardson*, 1 Nott & McC. 347. We think, however, the great preponderance of authority is that words charging an officer with gross ignorance and incapacity are actionable *per se*. Such is the opinion of Starkie. See his work on Slander, 4th English ed., 182, 184. Townshend, in his work on the same subject, sect. 194, says: "It is said, however, that it is actionable to charge ignorance or unskilfulness, if it amounts to gross ignorance or unskilfulness. This seems only another mode of imputing such ignorance as unfits the person for the proper exercise of his art, or of misconduct therein." Again, sect. 196, he says: "As regards language concerning one in office, the same general principles apply as to language concerning one in trade. Language concerning one in office, which imputes to him a want of integrity or misfeasance in his office, or a want of capacity generally to fulfil

the duties of his office, or which is calculated to diminish public confidence in him, or charges him with the breach of some public trust, is actionable." The following are some of the cases which hold that words charging an officer with gross ignorance of the duties of his office or profession are actionable without alleging any special damage: *Howe v. Prim*, Holt 653; 3 Salk. 694; *Day v. Butler*, 3 Wils. 59; *Onslow v. Horne*, Id. 186; *Peard v. Jones*, Cro. Car. 382; *Maises v. Thornton*, 8 Term Rep. 303; *Parker v. Marfue*, 1 Sid. 327; *White v. Carroll*, 42 N. Y. 161; *Robins v. Treadway*, 2 J. J. Marsh. (Ky.) 540. In the case of *White v. Carroll*, *supra*, the defendant, in speaking of the plaintiff as a physician, called him a "quack." Justice SUTHERLAND, in delivering the opinion of the court, says: "To call a physician a quack is in effect charging him with a want of the necessary knowledge and training to practise the system of medicine which he undertakes to practise. * * There cannot be any doubt, I think, that to falsely and maliciously call a physician a quack is actionable."

Certainly the language used by the defendant imputed a want of capacity and ability on the part of the plaintiff to discharge properly the duties of his office, and was calculated, if believed by his hearers, to diminish public confidence in him as a justice.

We are not yet prepared to say that the citizen, in the exercise of his right to criticise the acts and qualifications of those holding office, may publicly make false and malicious charges as to their honesty, or their capacity to discharge the duties of the offices held by them. Though the citizen has the right to criticise those in office, and a just and truthful criticism may be a wholesome corrective of abuses of official positions, such criticism should be honest and founded upon truth and not falsehood.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

Mr. Townshend in his work on Slander and Libel, lays down the rule, "that, subject only to the conditions, 1. That the occupation is one in which a person may lawfully be engaged; and 2. That it is an occupation which does, or reasonably may, yield, or may be expected to yield, pecuniary reward, there is no employment, call it business, trade, profession or office, or what you will, so humble or so exalted but that language

which concerns the person in such his employment will be actionable, if it affects him therein in a manner that may, as a necessary consequence, or does, as a natural or proximate consequence, prevent him [from] deriving therefrom that pecuniary reward which probably he might otherwise have obtained:" Townshend on Slander and Libel, § 182; citing, *Foulger v. Newcomb*, Law Rep. 2 Exch. 327; 1 Stark.

on Sland. 128; Cook on Defamation 21; *Ferry v. Hooper*, 1 Lev. 115; *Rex v. Lord Cockrane*, 3 M. & S. 10; *Sinclair v. Charles Phillips*, 2 B. & P. 363; and that as respects the occupation of the plaintiff, "it is now held to be sufficient, if the person whom the language concerns, habitually (as distinguished from occasionally) acts in or pursues the occupation to derive an emolument from it:" *Baboreau v. Farrell*, 15 C. B. 360; *Bryant v. Loxton*, 11 Moore 344; *Davis v. Davis*, 1 Nott & McC. 290; Stark. on Sland. *119.

As to the point that the occupation must yield a pecuniary reward, Starkie says that "words which affect a person in his office generally are actionable, whether the office be merely confidential and honorary, or be productive of emolument:" Stark. on Sland. *110, 111. Mr. Townshend, however, maintains the contrary doctrine. Townshend on Slander & Libel, § 184, and cases cited.

Concerning words damaging to one in his office or profession, the words in order to be *prima facie* actionable must clearly appear to be spoken of the party, or to "touch him," in respect to his office, profession or employment: Stark. on Slander *119; Cooley on Torts 201; Townshend on Slander & Libel, § 190, 196; and if the words counted on do not by themselves show this, the declaration must contain the necessary averments to connect them: Cooley on Torts 201; *Ayre v. Craven*, 2 Ad. & E. 7. Unless the language used does "touch" him in his special character or relation, its actionable quality must be determined by the rules which apply to language concerning an individual as such: Townshend on Slander & Libel, § 190; and in this respect there can be no doubt of the correctness of the principal case. As examples of this principle the cases of *Van Tassel v. Capron*, 1 Den. 250, and *Oakley v. Farrington*, 1 John. Cas. 129, may be referred to. In the former the words counted on

were: "I don't see why 'Squire Van Tassel did not tell me the execution had not been returned in time, so that I could sue the constable and his bail. There is a combined company here to cheat strangers, and 'Squire Van Tassel has a hand in it. K. A., J. G. and 'Squire Van Tassel are a set of d—d black-legs;" and in the latter the words were: "'Squire Oakley is a d—d rogue," and in both cases it was held that the language used imputed misconduct as men and not as magistrates, and that the words were not actionable *per se*. So, it has been considered not actionable to say of a justice of the peace that, "he is a logger-headed and a slouch-headed, hursen-bellied hound:" 1 Keb. 629; though perhaps this opinion may also be explained on the ground hereafter to be alluded to, that the office was one of credit only.

In the case of *Mayrant v. Richardson*, 1 Nott & McC. 347, referred to in the principal case, it was not alleged that the plaintiff had any office, or that the words had any relation to his profession or trade. The first count of the declaration in that case alleged that the plaintiff was a candidate for Congress and that the defendant, in conversation with divers electors of the district, maliciously and falsely declared and published of the plaintiff these words: "He [meaning the said Wm. Mayrant] is impaired in his understanding; his mind is impaired; his mind is injured by disease; that Dr. Irvine told him so; that Dr. Irvine said his mind was impaired, weakened and could never be depended on." By reason of the speaking of which words, plaintiff lost his election, and particularly the votes of several individuals mentioned. The second count stated the writing by defendant of a certain letter containing the words: "They [the people] believe him [plaintiff] to be a true republican, but from his frequently affected mind they can't support him for so important a

situation." The question arose on a general demurrer to the declaration, and the demurrer was sustained by both the inferior and appellate courts. It will be observed that this case is not an authority for the proposition that words charging an officer with mere ignorance and want of capacity to perform the duties of his office are not actionable *per se*, for the plaintiff was simply a *candidate*, not an *officer*, and as to this point the case is a mere *dictum*. As to the right to canvass the qualifications of candidates for office, which was the point decided in the case, see Townshend on Slander and Libel, § 247; Cooley on Const. Lim. *431, and cases cited.

In the case of *How v. Prinn*, 2 Salk. 695; Holt 653 (and see also *Regina v. Wrighten*, 2 Salk. 698; Starkie on Slander *111, 112), referred to by the court in *Mayrant v. Richardson*, the plaintiff declared that being a justice of the peace and deputy-lieutenant, and having served as knight of the shire, &c., and intending to stand candidate again, &c., the defendant, speaking of plaintiff and his standing candidate, said: "Do not vote for him for he is a Jacobite, and for bringing in the Prince of Wales and popery and to destroy our nation." Verdict for plaintiff and entire damages. In arrest of judgment, among other things, it was objected that the offices recited were not offices of profit, as to which the court say: "In offices of profit words that impute either defect of understanding, of ability, or integrity, are actionable; but in those of credit, words that impute want only of ability, are not actionable (see Townshend on Slander & Libel, § 184), as of a justice of the peace: 'He a justice of the peace! He is an ass, and a beetle-headed justice.' *Ratio est*, because a man cannot help his want of ability, as he may his want of honesty; otherwise where words impute dishonesty or corruption, as in this case, where the office is an

office of credit, and the party charged with inclinations and principles which show him unfit, and that he ought to be removed, which is a disgrace." As respects this case it is to be observed that it is not an authority upon the question whether charging an officer with mere ignorance and want of capacity to perform the duties of his office, is actionable *per se*, for the words complained of did not relate to that subject. And as to the *dictum* of the court, it is favorable to position assumed in the principal case, for at the present time the office of justice of the peace, though perhaps of little credit, is an office of some profit, in which case the words, "He a justice," &c., would come within the rule laid down by the court and would undoubtedly be actionable. The rule laid down in the principal case, that words charging an officer with gross ignorance and incapacity to perform properly the duties of his office (at least where the office is one of profit) are actionable *per se*, seems well settled. The cases upon the subject will be found collected in Townshend on Slander & Libel, §§ 193, 196; Folkard's Starkie on Slander *112; Cooley on Torts 201.

The following cases touching judges and attorneys, &c., are referred to as examples of actionable words:—

Falsely and maliciously to publish of a judge that "he lacks capacity as a judge," is actionable: *Robbins v. Treadway*, 2 J. J. Marsh. 540.

To say of an attorney: "He hath no more law than a monkey," is actionable: *March's New Cases* 60.

To say of an attorney: "He hath no more law than Mr. C.'s bull, or than a goose," is actionable: *Baker v. Morfue*, 1 Sid. 327.

"He cannot read a declaration," with a colloquium of want of skill, held actionable in *Powell v. Jones*, 2 Keb. 710; 1 Mod. 272.

"What, does he pretend to be a lawyer? He is no more a lawyer than

the devil ;" held actionable in *Day v. Buller*, 3 Wils. 59.

To say of a barrister : " He is a dunce and will get little by law ; he was never but accounted a dunce in the Middle Temple," is actionable : *Peard v. Jones* Cro. Car. 382.

To publish in writing of a barrister that he is a quack lawyer and mountebank and an imposter, is actionable : *Wakley v. Hooley*, 7 C. B. 591.

An action lies for saying of an utter-barrister : " Thou art no lawyer ; thou canst not make a lease ; thou hast that degree without desert : they are fools that come to thee for law : " *Banks v. Allen*, 1 Roll. Abr. 54.

Where a man said of a counsellor at law : " Thou art a daffa-down-dilly," it was held actionable ; though there being an averment that these words signified that he was an ambidexter, the

charge was not simply of ignorance and incapacity : 1 Roll. Abr. 55.

The ignorance must, however, be charged in general terms, in order to render the words actionable *per se*. Thus it has been held not actionable *per se*, to say of an attorney in a particular suit : " He knows nothing about the suit ; he will lead you on until he has undone you : " *Foot v. Brown*, 8 John. 64 ; *Weeks on Attorneys*, § 139, and cases cited ; although, as stated in the principal case, quoting from *Townshend on Slander & Libel*, § 194, " it is said, however, that it is actionable to charge ignorance or unskilfulness, if it amounts to gross ignorance or unskilfulness. This seems only another mode of imputing such ignorance as unfits the person for the proper exercise of his art, or of misconduct therein."

MARSHALL D. EWELL.

United States Circuit Court, Southern District of New York.

J. NELSON TAPPAN, TRUSTEE, ETC., v. THEODORE W. WHITTEMORE ET AL.

A debtor who had previously made a general assignment under a state insolvent law, paid a sum of money to a creditor. Subsequently, under proceedings in bankruptcy, a trustee for creditors was appointed, and on a bill filed by him, the assignment was set aside and the rights of the assignee vested in him. The trustee then, more than two years after his appointment, and after the payment had been made to the creditor, brought suit against the latter to recover the money paid, on the ground that at the time of payment it was the money of the assignee : *Held*, that the plaintiff could recover, as the cause of action had not accrued to him until the assignee's title had vested in him under the bill to set aside the assignment, and the statutory limitation had not therefore run at the time the suit was brought.

It would have been otherwise had the suit been brought merely on plaintiff's title as trustee in bankruptcy, to recover money paid in fraud of creditors or in contravention of the bankrupt act ; as in such case the cause of action would have accrued immediately on plaintiff's appointment as trustee.

ON demurrer. The case is sufficiently stated in the opinion.

Abbott Brothers, for plaintiff.

Edward B. Merrill, for defendants.

The opinion of the court was delivered by

WALLACE, J.—This case presents the single question whether upon the facts alleged in the complaint, which are admitted to be true, the defence of the statutory limitation of actions prescribed by section 5057 Revised Statutes of the United States, can prevail.

That section provides that “no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy, and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee.”

The complaint shows that the plaintiff was appointed and confirmed as trustee in bankruptcy of the estate of Archibald Baxter & Co., bankrupts, and as such trustee received an assignment of their estate on the 28th day of March 1876. On the 26th day of April 1878, the plaintiff brought the present suit to recover \$2500 paid by the bankrupts to the defendants on the 9th day of August 1875.

The complaint does not allege that the sum thus paid was paid in contravention of the bankrupt act, or in fraud of the creditors of Baxter & Co., but alleges that in fact the money belonged to one Dwight Johnson, to whom Baxter & Co. had made a general assignment of all their property, in trust for creditors, two days before the payment, and that when the defendants received the money they had knowledge of the assignment, and that the money belonged to Johnson.

Upon these facts it seems quite clear that the cause of action did not accrue to the plaintiff at the time when, as trustee, he received an assignment of the bankrupt's estate. He could not at that time have maintained an action against the defendant. Of course the bankrupts had no right of action to recover the money back, and the plaintiff, as trustee, acquired no better right than the bankrupts had, except as to property conveyed in fraud of creditors, or money or property transferred in contravention of the bankrupt act. The money which was received by the defendants was not the money of Baxter & Co., but that of Johnson, and no one except Johnson could have recovered it of the defendants.

Subsequently the plaintiff became vested with the cause of action. As appears by the complaint, he filed a bill to set aside the general assignment from Baxter & Co. to Johnson as a transfer in

contravention of the bankrupt act, and as void as to the plaintiff, because made with a view to prevent the property of the assignors from being distributed under the bankrupt act. And on the 15th day of May 1877, a decree was rendered in that action, setting aside the assignment as to the plaintiff. By force of this decree, and a transfer made in obedience to it, all the property and rights of action which had passed to Johnson under the general assignment became vested in the plaintiff. Then, and not until then, the plaintiff was in position to maintain an action against defendants for the money, which, under the assignment belonged to Johnson, but which the defendants had received without authority from Johnson. Then, and not until then, the cause of action accrued for the trustee. The statute begins to run only from the time when the assignee has a cause of action upon which he can bring suit. It is a statute to enforce vigilance and promptitude on the part of the assignee, and neither its language nor the object it is designed to effect, authorizes a construction which might deprive an assignee from enforcing a claim because two years may have elapsed before he has become vested with the right of action. If, in the present case, the trustee had failed without any fault or want of diligence on his part to obtain the decree setting aside the assignment until two years had elapsed, under the construction claimed by the defendants, he could not have maintained an action but would have been met and defeated by the statutory bar.

Thus he would be barred of his action although he never had a cause of action. This surely cannot be the intent of the statute. While the cause of action arose when the money was received by the defendants it did not accrue to the trustee until he could avail himself of it.

If it had appeared that Baxter & Co. paid the money to the defendants in contravention of the bankrupt act, or in fraud of the creditors, a different result would follow, because in such a case the plaintiff could have maintained an action against the defendants as soon as he was appointed trustee, and received an assignment of the bankrupt's estate, and Johnson's title to the money would not have stood in his way. In such a case the plaintiff would not have derived title through Johnson or through the assignment, but through the statute, which invested him with the right of action to recover all property conveyed by the bankrupt in fraud of his creditors or in fraud of the provisions of the bankrupt act (sections 5046, 5128,

Rev. Statutes U. S.), and the defendants could not have interposed the assignment, and Johnson's title under it, as a defence, because as against the assignment was void.

Undoubtedly, when the assignment was set aside at the suit of the trustee in bankruptcy, the title of the trustee related back to the time of the assignment. But the doctrine of relation is never applied to defeat a remedy, and cannot be invoked to subject the plaintiff to a disability which otherwise would not exist.

Judgment is ordered for the plaintiff.

Supreme Court of Indiana.

FRANK HAUSMAN v. A. T. NYE ET AL.

Where one purchases a number of articles at one time and by the same contract, he is not obliged to accept any unless all be delivered.

A delivery to a common carrier, not selected or designated by the purchaser, is not such a delivery or acceptance of goods as will take the contract out of the Statute of Frauds.

Whether such a delivery, in the case of a contract valid in itself, might be sufficient to transfer the title and risk to the purchaser, *quære*.

ON error to Daviess Circuit Court.

This was an action for the price of a number of stoves, purchased by defendant, but which he refused to receive, on the ground that his whole order was not filled. The court below gave judgment for the plaintiff. The facts sufficiently appear in the opinion.

Mason & Bynum and Burns & Burns, for appellant.

Gardiner & Armstrong, for appellees.

The opinion of the court was delivered by

PERKINS, J.—The contract in the case between the plaintiff and the defendant, embraced all the articles in the bill of particulars sued on and others in addition. One of the plaintiffs in his testimony said: "I shipped the goods, as per Mr. Hausman's order, to Scott, with the exception of three number seven Charm heating stoves, which we could not at that time ship, as they were not then on hand." The defendant below, Hausman, in his testimony stated that "he ordered other goods at the same time, viz.: ordered three number seven Charm heating stoves but they did not come. I ordered all these goods at one time, and would

not have ordered part without the rest. I needed the stoves which did not come in my business."

The contract was an entire contract for the whole of the bill of goods ordered, and the defendant, Hausman, was not obliged to accept the part shipped: *Smith v. Lewis*, 40 Ind. 98.

Again, the contract was void by the Statute of Frauds. It was an Indiana contract made at Washington, in this state, between the defendant, Hausman, and Sanford W. Scott, agent of the plaintiff, with full power to make the same a finality: *Kiewert v. Myers*, 61 or 62 Ind. (not yet reported). Our statute reads thus: "No contract for the sale of any goods, for the price of fifty dollars or more, shall be valid, unless the purchaser shall receive part of such property or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

In this case the contract was for the price of over fifty dollars; no part of the property was received by the purchaser; no earnest was given to bind the bargain or in part payment, and no note or memorandum signed by the party to be charged or his lawfully authorized agent was made.

It is claimed that there was a delivery and acceptance of the goods under contract. Scott, the agent of the plaintiffs, testified touching the contract as follows: "In behalf of the plaintiffs, some time in September, A. D. 1874, I sold to Mr. Frank Hausman two number two Onega stoves at \$10 each; two number three Onega stoves at \$15 each; two number seven Alladine cook stoves, with ware, at \$11 each; three number seven Charm heating stoves at \$4.50 each; three number eight Charm heating stoves at \$5.50 each. The terms of sale were ninety days credit. The freight was to be paid by plaintiffs to Cincinnati, and the goods to be shipped at the defendant's risk."

Hausman, the defendant, testified: "It was agreed when I ordered the goods that the plaintiffs should ship them from Marietta, Ohio, to Washington, Indiana, and that they should pay the freight to Cincinnati, Ohio, and I the rest of the way. Nothing was said by either him or me about shipping the goods at my risk."

As to the manner of the shipment made of the goods, Mr. Nye, one of the plaintiffs, testified: "The plaintiffs delivered the goods in the said invoice mentioned upon the wharf-boat of Hall & Bert,

steamboat agents and owners of the Marietta wharf-boat at Marietta, Ohio, marked and directed plainly to Frank Hausman, Washington, Daviess County, Indiana, consigned to the Ohio & Mississippi Railroad, Cincinnati, Ohio. Bills of lading were taken, one of which was sent to Hausman."

Nothing was said between the parties at the time of the contract or afterwards as to the manner or route or vessel in or by which the goods were to be shipped, nor as to the carrier to whom they were to be delivered. The bill of lading signed by Hall & Bert recited a shipment of goods by Nye & Son "on board the good steamboat 'Chesapeake' to be delivered at the port in Cincinnati unto the Ohio & Mississippi Railroad Company or assigns, they paying freight, &c. Marked, Frank Hausman, Washington, Ind."

The contract, as we have said, was an Indiana contract and void under the Statute of Frauds. It was not executed by what was done in Marietta, Ohio, claimed to have constituted a delivery and acceptance, or rather, as the statute requires, a reception by the purchaser of the goods or a part thereof: 1. Because the contract was entire for the delivery of all the goods or none. The delivery of a part to a carrier in the absence and without the knowledge of the vendee, could be no delivery under and pursuant to the contract; 2. A delivery to a carrier, not named by the vendee, was not a delivery to the vendee.

It was once held that a delivery to a common carrier, not selected by the purchaser by the latter's direction, was an acceptance by the purchaser within the statute: *Hart v. Sattley*, 3 Camp. 528. But this case has not been followed in later cases: *Spencer v. Hale*, 30 Vt. 314. In *Rodgers v. Phillips*, 40 N. Y. Court of App. 519, it is decided that, "Upon a verbal contract for the sale of goods for more than fifty dollars in value, a delivery of them, in accordance with such contract, to a general carrier, not designated nor selected by the buyer, does not constitute such a delivery or acceptance, under the Statute of Frauds, as to pass the title to the goods;" although, in the case of a contract itself valid, such a delivery might be sufficient to transfer the title and risk to the purchaser. But it is not necessary that we should express an opinion upon this point. See *Strong v. Dodds*, 47 Vt. 348. Also, on the general subject, the elaborate case of *Bacon v. Eccles*, 43 Wisconsin 227; *Allard v. Greasart*, 61 New York 1. In *Lloyd v. Wright*, 20 Geo. 574, it is said, in the opinion of the court:

“Under the proof, was this case within the 17th section of the Statute of Frauds? The statute requires that the purchaser shall ‘actually receive’ the goods. But although goods are forwarded to him by a carrier by his direction, or delivered abroad, or on board of a ship chartered by him, still there is no actual acceptance to satisfy the act, so long as the buyer continues to have the right either to object to the *quantum* or quality of the goods.” See also Chitty on Contracts 392; Story on Contracts 381, 383; *Acebal v. Levy*, 10 Bingham 376; *How v. Palmer*, 2 B. & A. 321; *Sheppard v. Prassy*, 32 N. H. 49.

In *Maxwell v. Brown*, 39 Me. 98, the court say: “From the language of this statute, it is apparent that, when there is no written contract, a mere delivery will not be sufficient. There must further be an acceptance by the purchaser, else he will not be bound.” In *Baldev v. Parker*, 2 B. & C. 37, it was formerly considered, observed BEST, J., “that a delivery of the goods by the seller was sufficient to take a case out of the 17th section of the Statute of Frauds; but it is now clearly settled that there must be an acceptance by the buyer as well as a delivery by the seller.”

In the same case HOLROYD, J., said: “As long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute.”

Judge WRIGHT, in *Shindler v. Houston*, 1 Comstock (N. Y.), p. 299, says: “The best considered cases hold that there must be a vesting of the possession of the goods in the vendee as absolute owner, discharged of all liens for the price on the part of the vendor, and an ultimate acceptance and receiving of the property by the vendee so unequivocal that he should have precluded himself from taking any objection to the quantities or quality of the goods sold.” See *Kirby v. Johnson*, 22 Mo. 354; *Kiewart v. Myers*, *supra*; *Hewes v. Jordan*, 39 Md. 472; *Hooker v. Knob*, 26 Wis. 511; *Stone v. Browning*, 51 N. Y. 211; *Gibbs v. Benjamin*, 13 Am. Law Reg. (N. S.) 93 and note; *Stone v. Browning*, 68 N. Y. 598; *Edwards v. G. T. Railroad Co.*, 54 Me. 105; *Johnson v. Celter*, 105 Mass. 447.

In the case at bar the contract was void by the Statute of Frauds. There was no acceptance of the goods by the purchaser.

The judgment is reversed with costs, and the cause remanded for a new trial.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹SUPREME COURT OF ERRORS OF CONNECTICUT.²SUPREME COURT OF ILLINOIS.³COURT OF CHANCERY OF NEW JERSEY.⁴SUPREME COURT COMMISSION OF OHIO.⁵

ACCOUNT.

Between Partners—Statute of Limitations—Laches.—To render the lapse of the statutory period a bar to an action for an account by one partner against another, it must appear that the account has been closed for six years: *Stout v. Executors of Seabrook*, 30 N. J. Eq.

Great delay is a good bar in equity. A decree requiring a copartner to account, should be denied in every case where it appears the party seeking the account, has, by his laches, rendered it impossible for the court to do full justice to both parties: *Id.*

If, in an action for an account, the court is satisfied nothing is due to the complainant from the defendant, a dismissal must be directed: *Id.*

ASSIGNMENT.

Form not regarded in Equity.—Any writing which clearly appropriates a fund or property to a person, will, in equity, be esteemed an assignment. Equity disregards mere form: *Bower v. Haddon Blue Stone Co.*, 30 N. J. Eq.

BANKRUPTCY. See *Errors and Appeals*.

BILLS AND NOTES.

Draft—Acceptance.—A telegram, agreeing to accept a person's draft for a certain sum, "for stock," is not a conditional contract, but an absolute undertaking to accept and pay the same, and a party discounting the draft on the faith of such telegram, is entitled to recover the amount of the party so agreeing to accept: *Coffman v. Campbell*, 87 Ill.

CITIZENSHIP. See *United States Courts*.

COLLISION. See *Negligence*.

CONSTITUTIONAL LAW.

Power of Congress over District of Columbia—Taxation—Confirmation of Proceedings otherwise void.—Under the Constitution, Congress has power to exercise exclusive legislation, in all cases whatsoever, over the District of Columbia, and this includes the power of taxation. Con-

¹ Prepared expressly for the American Law Register, from the original opinions filed during October Term 1878. The cases will probably be reported in 7 or 8 Otto.

² From John Hooker, Esq., Reporter; to appear in 45 Connecticut Reports.

³ From Hon. N. L. Freeman, Reporter; to appear in 87 Illinois Reports.

⁴ From John H. Stewart, Esq., Reporter; to appear in 30 New Jersey Equity Reports.

⁵ From E. L. DeWitt, Esq., Reporter; to appear in 32 Ohio St. Reports.

gress may legislate, within the district, respecting the people and property therein, as may the legislature of any state over any of its subordinate municipalities. It may, therefore, cure irregularities, and confirm proceedings which, without the confirmation, would be void, because unauthorized, provided such confirmation does not interfere with intervening rights: *Mattingly v. District of Columbia*, S. C. U. S., October Term 1878.

Police Powers of States—Railroads—Lighting Roads in Cities.—The power of police regulation throughout the state is vested in the legislature, and, in the exercise of this power, railway companies may constitutionally be required to light such portions of their railways as are within a city or incorporated village: *Cincinnati, Hamilton and Dayton Railroad Co. v. Sullivan*, 32 Ohio St.

The 32d chapter of the municipal code of 1869, which authorizes city and village councils, by ordinance, to require such lighting to be done by the owners of such railways, and on their failure to comply with such ordinance, authorizes the council to procure such lighting done at the expense of such owners, is not in conflict with the constitution of the state: *Id.*

When, on default of the railway company, such lighting is procured to be done by the council, the expense of such lighting may, by the council, be assessed or declared a lien upon any of the real estate of the railway company within the municipality: *Id.*

The liability of the railway company to pay such expense, can only be enforced by suit or action, or, in the language of the constitution, "by due course of law." It is not a *tax*, or an *assessment* in the nature of a tax for local improvements, and cannot therefore be summarily placed upon the county duplicate and collected as a tax or assessment proper: *Id.*

COURTS.

Power to amend their Records.—Courts always have jurisdiction over their records to make them conform to what was actually done at the time: *The City of Elizabeth et al. v. The American Nicholson Pavement Co.*, S. C. U. S., October Term 1878.

Power to appoint Arbitrators.—The power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it, is incident to all judicial administration, where the right exists to ascertain the facts as well as to pronounce the law. *Conventio facit legem*. In such an agreement there is nothing contrary to law or public policy: *Newcomb v. Wood*, S. C. U. S., October Term 1878.

DEBTOR AND CREDITOR. See *Husband and Wife*.

Voluntary Conveyance—Where void against Creditors.—As to debts existing at the time a voluntary conveyance is made, the law raises a conclusive presumption of fraud, but a subsequent creditor can only impeach such a conveyance by showing fraud in fact: *Claflin v. Mess*, 30 N. J. Eq.

A subsequent creditor may avoid a voluntary deed on the ground that it was made to defraud existing creditors, but, in order to do so, he must show debts still outstanding which existed when the deed alleged to be fraudulent was made: *Id.*

Payment by a grantor of all his debts existing at the time he makes a voluntary conveyance, repels the idea that he thereby intended to defraud his creditors: *Id.*

DEED. See *Equity*.

DOWER. See *Husband and Wife*.

DURESS.

Deed made under—Equity.—On a bill to set aside a transfer of property, alleged to have been obtained by duress, persons in whose favor certain charges on the lands thereby conveyed were made, are necessary parties: *Probasco v. Probasco*, 30 N. J. Eq.

A bill which alleges that a feeble old man has, without consideration, transferred to his children all of his property, amounting to \$45,000, reserving to himself only an annuity of \$1200, inadequately secured, and without any provision whatever for his wife in case she survive him: and that such transfer was obtained from him by want of comprehension on his part, and duress and false representations as to its effect on the part of his children, shows sufficient equity, and will, therefore, be sustained on general demurrer: *Id.*

EASEMENT.

Title by adverse User.—Title by adverse user rests upon the presumption of an actual grant which has been lost: *Lehigh Valley Railroad Co. v. McFarlan*, 30 N. J. Eq.

To raise the presumption of a grant where title to an easement is asserted, it must be shown that the use has extended over a period of twenty years, and has been for that period continuous and peaceable: *Id.*

Proof of acquiescence by the owner of the servient lands, in the exercise of the adverse right, is indispensable in proving title to an easement by adverse user: *Id.*

Where the user has been exercised by force, or by permission, or in the face of protests and in defiance of resistance, a grant cannot be presumed: *Id.*

Resistance by words is sufficient to prevent the presumption of a grant of an easement: *Id.*

EQUITY. See *Duress*; *Infant*; *Mortgage*.

Chancery Jurisdiction—Trust—Factor.—In case of the bailment of property to a factor in trust to sell, on his refusal to pay the proceeds to the person entitled to the same, a court of chancery has no jurisdiction to enforce the trust, there being a complete remedy at law in favor of the party entitled to the money; *Taylor v. Turner*, 87 Ill.

Bill of Peace—Preventing Multiplicity of Suits.—A bill of peace can only be maintained after the complainant has satisfactorily established his right at law, or where the persons who controvert it are so numerous as to render the intervention of this court necessary to save multiplicity of suits: *Lehigh Valley Railroad Co. v. McFarlan*, 30 N. J. Eq.

Where several plaintiffs bring different suits at law against one defendant, some for diminishing their supply of water, and another for

backing water on his mill-wheel, no ground for interference to prevent multiplicity of suits is shown, although the alleged injuries are done in the use by the defendant of one stream: *Id.*

Deed—Signing of Grantor's Name by Another—The application of the maxim, that he who asks equity must do equity, is not limited to any particular class of cases, but may be applied whenever it is necessary to the promotion of justice: *Mutual Benefit Life Ins. Co. v. Brown*, 30 N. J. Eq.

At common law signing is not necessary to the due execution of a deed, but it is made so by the Statute of Frauds: *Id.*

But if the grantor's name is written in his presence and by his direction, it is his act, and he will not be permitted, in a court of equity, to repudiate a deed thus executed: *Id.*

ERRORS AND APPEALS.

When second Writs of Error or Appeals will lie.—Second appeals or writs of error, as the case may be, will lie in certain cases where it is alleged that the mandate of the appellate court has not been properly executed; but the appeal or writ of error, in such a case, will bring up nothing for re-examination except the proceedings subsequent to the mandate. Needful explanations may be derived from the original record, but the re-examination cannot extend to anything that was decided in the antecedent appeal or writ of error: *Stewart v. Salamon et al.*, S. C. U. S., October Term 1878.

Supervisory Jurisdiction of Circuit Court in Bankruptcy.—An appeal will not lie from the judgment of a Circuit Court in a proceeding by a creditor to prove his demand against the estate of a bankrupt: *Ingersoll v. Bourne et al.*, S. C. U. S., October Term 1878.

EVIDENCE.

Release of Mutual Demands—Parol Evidence not admissible to show that certain Matters were not included.—H., in 1854, being embarrassed, intrusted certain property to N., to be sold, and after the payment of certain debts, the surplus to be returned to him. In 1862 the last portion of the property was sold to one B., and his note, payable to N., taken in payment. In 1868 H. and N. executed the following mutual release, under seal: "The undersigned, having had mutual dealings, in former days, have reviewed the same; and though there is justly due a balance from H. to N., yet, in consideration of love and affection and of one dollar, we each release to the other all obligations and demands whatsoever." At this time there remained unpaid the sum of \$600 on the note of B., which was afterwards received by N. In assumpsit, brought by H. against N.'s executor, for the recovery of the money, it was held that proof was not admissible that, at the time the release was given, N. told H. that the money remaining unpaid on B.'s note should not be included in the release. Also, that evidence was not admissible that N., after the release and after receiving the \$600, had admitted that the money belonged to H.: *Drake v. Starks, Executor*, 45 Conn.

Experts.—The opinion of experts in handwriting is evidence of low degree: *Mutual Benefit Life Ins. Co. v. Brown*, 30 N. J. Eq.

FACTOR. See *Equity*.

FORFEITURE.

Waiver of.—A bond, secured by a mortgage, provided that on default in the payment of the interest thereon for thirty days after the same had become due, the principal should, at the option of the obligee, become payable. *Held*, that after the obligee had ratified several parol extensions of the time for paying the interest, made by her agent, a subsequent similar extension would be deemed a waiver of the forfeiture, and a suit at law to enforce the bond on the ground of such forfeiture would be enjoined: *Bell v. Romaine*, 30 N. J. Eq.

FRAUD.

Liability of one Co-operating in.—A purchaser who co-operates with the vendor in the misappropriation of purchase-money, which he knows was raised for the benefit of a third person, renders himself liable to the person defrauded to the extent of the fund misapplied with his connivance: *Bower v. Haddon Blue Stone Co.*, 30 N. J. Eq.

GUARDIAN. See *Infant*.

HUSBAND AND WIFE.

Release of Inchoate Dower—Fraud on Creditors.—A release of the wife's inchoate right of dower is a valid consideration for a conveyance of property to her: *Singree v. Welch*, 32 Ohio St.

Such conveyance will not be held fraudulent and void as to the husband's creditors, unless the amount of consideration received is so disproportioned to the value of the wife's contingent dower as to be unreasonable: *Id.*

So great is the difficulty of estimating the worth of contingent dower rights, so uncertain and imaginary are the values which are the necessary elements of the computation, that the court will not pronounce the transaction fraudulent from the fact that the wife insisted upon and received a sum greater than her dower, if the facts do not show *mala fides* in her or her husband: *Id.*

Post-nuptial Contract.—A post-nuptial contract, made upon sufficient consideration, and wholly or partially executed, will be sustained in equity: *Kesner v. Trigg et al.*, S. C. U. S., October Term 1878.

INFANT.

Property Rights of Infant—Settlement on coming of Age—Trust—Equity.—It is the peculiar province of equity to take cognisance of transactions growing out of relations of trust, and to prevent those holding such positions from using them and their influence for their own aggrandizement: *Berkmeyer v. Kellerman*, 32 Ohio St.

All the power, influence and skill of one occupying such a relation is to be used for the advantage of the beneficial owner, and not for personal gain; and all increase, gains, and profits, whether arising from the natural increase in value of the property, or from the management of the trustee, are the absolute property of the beneficiary: *Id.*

One standing in the relation of a parent and guardian in fact of a minor, having the custody and control of such minor and of his property

during such minority, is bound to the most scrupulous good faith in the management of the estate, and where, on such minor's coming of age, he attempts to make a settlement of his trust with him, a court of equity will examine the transaction with extreme jealousy, to see that no undue influence has been exercised; that the parties have been put on an equal footing, by full disclosures; and that no advantage has been taken: *Id.*

Where a party occupying such a relation claims any benefit or advantage from a settlement with his ward, on his coming of age, of his trust transactions, the burden of proof is on him to show that he has made full disclosures; that he has exercised no undue influence; and that such settlement is fair and equitable: *Id.*

A conveyance by such minor, on the day he comes of age, of all his real estate to the persons occupying such relations, in execution of such a settlement made for such minor by others not authorized to bind it, and while he is still under their influence and control, and not advised of his rights, is not binding, and can only be upheld in a court of equity by clear proof that under all the circumstances it is just and equitable: *Id.*

JUDGMENT. See *Set-off*.

LACHES. See *Account*; *Mandamus*.

LIMITATIONS, STATUTE OF. See *Account*; *Mandamus*.

MANDAMUS.

Limitation in regard to issuing of—Laches.—The limitations of the code of civil procedure, as to the time of commencing civil actions, are applicable, as a bar, only to suits comprehended within the civil action of the code, which is a substitute for all such judicial proceedings as were previously known, either as actions at law or suits in equity, and does not embrace proceedings in mandamus: *Chinn v. Trustees, etc.*, 32 Ohio St.

There is, in Ohio, no statutory limitation as to the time within which a writ of mandamus may be obtained. Nevertheless, where the relator has, for an unreasonable time, slept upon his rights, the court may, in the exercise of sound discretion, upon the hearing of the case refuse to issue the writ: *Id.*

In determining what will constitute such unreasonable delay as to justify a refusal of the writ, regard may properly be had to circumstances which justify such delay, to the character of the case, and the nature of the relief demanded, and to the question whether the rights of the defendant, or of other persons, have been prejudiced by such delay: *Id.*

MORTGAGE. See *Forfeiture*; *Subrogation*.

Equity—Mistake in Deed making Conveyance subject to.—A mortgagee cannot avail himself of an assumption of a mortgage inserted in a deed of the premises by the mistake of a scrivener in copying the grantor's deed; neither of the parties to the deed intending or being aware of it: *Stenens Institute v. Sheridan*, 30 N. J. Eq.

Conveyance of Mortgaged Premises in Lots—Order of Liability.—Where the grantee of a mortgagor conveys the mortgaged premises in

different parcels, and the grantees of such parcels again convey them in parcels—*Held*, that the grantees of the latter parcels are liable to pay the share of the mortgage debt chargeable on the part of the mortgaged premises, of which the premises conveyed to them are part, in the inverse order of conveyance to them : *Hiles v. Coult*, 30 N. J. Eq.

MUNICIPAL CORPORATION. See *Constitutional Law*.

Trespass in removing supposed Encroachments on the Highway—Liability of Borough for Acts of its Officers.—The charter of a borough gave the warden and burgesses authority to order the removal of all encroachments upon any public highway of the borough, and upon the order not being obeyed, to cause them to be removed. The warden, acting officially and under a vote passed by the warden and burgesses, caused a fence of the plaintiff, along the line of the highway, to be removed, the plaintiff not obeying an order previously made for its removal. The fence was in good faith supposed, by the warden and burgesses, to be an encroachment, but was not so in fact. In an action of trespass brought against the borough, it was *held* (two judges dissenting): 1. That the grant of power, though to the warden and burgesses, was in reality to the borough. 2. That the power to remove encroachments was a power asked for and obtained by the borough for its own advantage, and not for the benefit of the public. 3. That, in the removal of encroachments, it was therefore exercising a privilege, not discharging a governmental duty. 4. That the borough was liable for the acts of the warden : *Weed v. Borough of Greenwich*, 45 Conn.

NATIONAL BANK.

Loans on Real Estate.—The banking law of the United States prohibits national banks from loaning money on real-estate security. They are limited to loans on personal security. Therefore, a mortgage given to an officer of such a bank, at the time of a loan by the bank, to secure its payment, being in effect the same as if made to the bank, is void, and will not be enforced by the courts : *Findley v. Bowen*, 87 Ill.

NAVIGABLE STREAM. See *Negligence*.

NEGLECT.

Navigable Stream—Vessel anchored without Light—Pilot.—The bridge over the Ohio river at Parkersburg, being authorized by a law of Congress, the obstruction of navigation at that point, so far as it was reasonable and necessary to the construction of the work, was justified : *Baltimore and Ohio Railroad Co. v. Wheeling, Parkersburg and Cincinnati Transportation Co.*, 32 Ohio St.

In considering the rights of navigation, they must be viewed as limited by those rights which have been conferred upon the bridge company by the law authorizing the structure in question : *Id.*

What might be negligence in leaving a barge unguarded in a navigable part of the river, is not necessarily negligence if it is so left under circumstances fairly justified by the necessities or convenience of those engaged in the erection of the bridge : *Id.*

Although prudence dictates that a vessel, left during the night in the usual route of passing craft, should display a light as a signal of warning

to others, yet, when such vessel is moored out of the usual path of navigation, where boats rarely if ever come, and in a place where the bridge work was going on from day to day, such work at times necessitating a temporary closing of the passage-way altogether, the absence of a light upon a vessel so circumstanced is not necessarily negligence : *Id.*

Before such alleged negligence can become the foundation of a right to recover damages, it must appear to have been the proximate cause of the injury occasioning such damages : *Id.*

When a pilot leaves the usual and customary channel of navigation, that fact requires an increased amount of care on his part to avoid the danger attending the new risks he undertakes. If, in pursuing such a course, he encounters a collision, it is not a sufficient justification for him to show that he exercised that ordinary care proper in the usual and ordinary course of navigation : *Id.*

Approaching places of danger, such as the piers of a bridge, during the night-time, a lookout is indispensable upon a steamboat. An omission in this regard is such negligence as will prevent a recovery, unless it clearly appears that a lookout could not, by any possibility, have prevented disaster : *Id.*

A pilot having mistaken his course, and not knowing where his boat is, who attempts the dangerous passage of a bridge at night, at the highest rate of speed and without any lookout, is guilty of negligence. And if, under such circumstances, he collides with a barge moored to a bridge pier, which is out of the usual channel of navigation, and by the collision his own boat is lost, the owners of the boat cannot recover, although the barge was without a light : *Id.*

OFFICE AND OFFICER.

Abolition of Office by repeal of Law creating it.—The legislature has power to repeal a statute under which an incumbent of an office has been appointed to and holds the office for a term not yet expired ; and the office expires with the repeal of the statute : *State ex rel. Birdsey v. Baldwin*, 45 Conn.

PARTNERSHIP. See Account.

Notice by Dormant Partner.—The duty of a retiring dormant partner to give notice of the dissolution of the partnership, is a duty which he owes to those who before that time had some knowledge of his connection with the firm. To strangers, having no such knowledge, he owes no such duty. As to them, he can only be charged as a partner, when in fact he was not, by showing that he, in some way, misled them, as that he held himself out to the world as such, or that he so held himself out to them : *Nussbaumer v. Becker*, 87 Ills.

Money Lent to one Partner—Surety.—Where a partner borrows money on the credit of his individual note, which is signed also by a surety, such borrowing does not create a partnership debt, though the money be applied to partnership purposes ; and the principal of such surety is the individual partner, with whom he joins in the execution of the note, and not the partners generally : *Peterson v. Roach*, 32 Ohio St.

POSSESSION.

Notice of Title.—The principle that the possession of land is notice

to others of the possessor's title, is intended to protect only equitable rights, and not to cover the possessor's fraud, or to protect him where he is without equity: *Groton Savings Bank v. Batty*, 30 N. J. Eq.

As against an innocent mortgagee, notice from the possession of lands cannot be set up by an occupant who was insolvent when he placed the title in the name of the mortgagor, and knew, soon after the time of the giving of the first of the two mortgages, that it had been given, and did not notify the mortgagee of his claims, but kept silent and permitted the mortgagor to borrow more money of the mortgagee on a second mortgage of the property, whereas if he had notified the mortgagee of his claim when he first was made aware of the existence of the first mortgage, the mortgagee might have collected the mortgage debt of the mortgagor, and would have not made the second loan on security of the mortgaged premises: *Id.*

RAILROAD. See *Constitutional Law*; *Specific Performance*.

Maintenance of Order on Train—Duties of Conductor.—It is not only the right of a conductor to expel from a train a drunken, unruly, boisterous passenger, but when such a person endangers by his acts the lives of people, it is the duty of such conductor to remove such passenger in order to protect others from violence and danger: *Railway Co. v. Valleley*, 32 Ohio St.

But this right must be reasonably exercised, and not so as to inflict wanton or unnecessary injury upon the offending passenger, nor so as to needlessly place him in circumstances of unusual peril: *Id.*

If having exercised reasonable prudence, considering the time, place, and circumstances, as also the condition of the drunken man himself, the conductor expels such passenger, who is afterward run over and killed by another train not in fault, the expulsion itself is not such proximate cause of the death as will make the company liable: *Id.*

SET-OFF.

Assignment of Judgment.—The assignee of a judgment taking without notice that the judgment debtor has any equitable right to have an unsettled demand set off against it will be protected. Notice that the judgment-debtor has a demand against the plaintiff in the judgment is not any ground for allowing a set off to defeat the equitable right of the assignee: *Ullman v. Kline*, 87 Ills.

SPECIFIC PERFORMANCE.

Agreement to Cancel or Rescind Sale on Failure of Certain Conditions.—If a party in selling real estate in a city guarantees that a certain street will be extended and opened through the property within two years, and agrees that if such street is not opened within that time, on a re-conveyance by the purchaser, to refund the money paid for the same, with ten per cent. interest, a court of equity will specifically enforce the contract against the vendor on a tender of a proper deed to him: *Kerfoot v. Breckenridge*, 87 Ills.

Contract to build Railroad.—Specific performance was refused of a contract to build and equip a railroad, although the contract price was to be paid in the stock and bonds of the company, and the estimates, &c., were to be made by the company. The company declared its inability to comply with the requirements of a supplement to the act (a general law)

under which it was incorporated, and the penalty for non-compliance therewith was, by the supplement, declared to be the forfeiture of its charter. It therefore, and merely for that reason, declined to proceed further under the contract: *Danforth v. Philadelphia & Cape May Railway Co.*, 30 N. J. Eq.

The court refused to consider the constitutionality of such supplement, so far as the defendants were concerned, and also refused to direct them to make estimates for the work already done under the contract: *Id.*

SUBROGATION.

Mortgagee—Payment of Taxes—Subrogation against second Mortgagee.—The holder of a first mortgage discovering, during foreclosure, that certain taxes were a lien on the premises, paramount to all encumbrances, entered into an agreement, through his solicitor, with the solicitor of a second mortgagee, that if he, the first mortgagee, would pay the taxes, and the second mortgagee should buy the premises at the foreclosure sale, he should be repaid by the second mortgagee. After such payment, sale and purchase, the second mortgagee refused to refund the amount of the taxes: *Held*, that the first mortgagee could not be subrogated to the original lien of the township for the taxes, and have the amount paid by him decreed a lien on the lands: *Manning v. Tuthill*, 30 N. J. Eq.

SURETY. See *Partnership*.

TRESPASS. See *Municipal Corporation*.

TRUST. See *Equity*; *Infant*.

UNITED STATES COURTS. See *Errors and Appeals*.

Jurisdiction—Citizenship of Parties—Residence not equivalent to Citizenship.—In cases where the jurisdiction of the federal courts depends upon the citizenship of the parties, the facts, essential to support that jurisdiction, must appear somewhere in the record: *Robertson v. Cease*, S. C. U. S., Oct. Term 1878.

They need not necessarily be averred in the pleadings. It is sufficient if they are in some form affirmatively shown by the record: *Id.*

The record in such cases includes only such portions of the transcript as properly constitute the record upon which the court must base its final judgment, and not papers which have been improperly inserted in the transcript: *Id.*

Citizenship and residence are not synonymous terms: *Id.*

There is nothing either in the language or policy of the 14th amendment to the constitution to support the position that the bare averment of the residence of the parties is sufficient, *prima facie*, to show jurisdiction: *Id.*

USURY.

Taken notice of by Court of Equity.—Although, by the terms imposed upon a defendant who is let in to answer, he is prevented from setting up usury, yet, if usury be proved, the complainant will be allowed to recover only the amount equitably due upon his mortgage: *Powers v. Chaplain*, 30 N. J. Eq.

VENDOR AND VENDEE.

When Purchase-Money may be recovered back.—Where a party gave a bond for a warranty deed to real estate, to be made on a certain day, if the purchase-money should then be paid, it was *held*, that the making of the deed and the payment of the money were concurrent acts; and where the vendor of the land is not able to make the title he agreed to give, at the time agreed upon, and the purchaser is ready and willing and able to make his payment, the latter may sue for and recover back what he has paid on the contract: *Clark v. Weis*, 87 Ills.

WATERS AND WATERCOURSES

Jurisdiction of Equity to settle conflicting Rights to use of Streams.—Equity has jurisdiction (and for that purpose may enjoin the further prosecution of suits at law) in a case which involves the relative rights, under their charters, of two corporations to the use of the waters of the same stream or streams; and such jurisdiction exists on the ground of both public and private necessity. In such cases, equity is not only the appropriate forum, but the only one where adequate relief in the premises can be administered: *Lehigh Valley Railroad Co. v. Society for Establishing Useful Manufactures*, 30 N. J. Eq.

WILL.

Undue Influence—Inference from Circumstances without Direct Evidence.—Where a testator, leaving an estate of \$14,000, with no family, made a will five days before his death and while suffering from severe disease, by which, after giving two of his brothers \$1000 each, \$1000 to certain other relatives, and \$1000 to a friend, he gave the residue of his estate to a church in the town where he lived; and it appeared that the will was drawn by H., who was a vestryman of the church and who was the only person who conversed with him on the subject, and who was also made sole executor; that three brothers and a sister of the testator lived within a few miles of him and were not notified of his being dangerously ill until shortly before his death and after the will was executed; that H. was deeply interested in the welfare of the church and a liberal contributor to its support; that he and another vestryman were two of the witnesses to the will and a brother-in-law of H. the third witness; and that the will described certain half nephews and a half niece of the testator as his brothers and sister—it was *held*, that the circumstances were such as to create a suspicion of undue influence, which might be considered by the jury without any direct proof of such influence, and to require explanation on the part of the persons propounding the will. *Drake and others' Appeal*, 45 Conn.

Quære: Whether the vestrymen were competent witnesses to the will.

Codicil—Revocation.—Where a testator by a codicil revokes a devise or legacy, and grounds such revocation on the assumption of a fact which proves not to exist, the revocation is regarded as contingent upon the existence of such fact and does not take effect: *Dunham v. Averill*, 45 Conn.

But the courts will not set aside such a revocation where it does not appear by the will itself that it was made under the belief of the existence of such fact: *Id.*

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TITLE BY ADVERSE POSSESSION.

TITLE to land by adverse possession is based upon the Statute of Limitations. While the statute does not profess to take an estate from one man and give it to another, yet, it bars the claim of the former owner, and quiets the title of him who has actually occupied the premises for the period prescribed by the statute. The effect of the statute is to transfer the title to the adverse occupant. In *Graffius v. Tottenham*, 1 W. & S. 488, GIBSON, J., says: "The title of the original owner is unaffected and untrammelled till the last moment, and is vested in the adverse occupant by the completion of the statutory bar." The Statute of Limitations is said by an eminent jurist (Story's Conf. of Laws, sect. 576) to be one "of repose to quiet titles, to suppress frauds, and to supply the deficiency of proofs arising from the ambiguity and obscurity or antiquity of transactions." The *prescription* of the civil law was not as broad in its application as the Statute of Limitations. It being provided that "things movable may be prescribed to after the expiration of three years, and that a possession during a long tract of time, will also found a prescription to things immovable; that is to say, ten years if the parties are present, and twenty years if either of them be absent. Property may thus be acquired * * * if the property was honestly obtained at first:." Sanders's Justinian, Lib. 2, title 6.

By the ancient common law, a person might have prescribed for a right which had been enjoyed by his ancestors or predecessors at

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any distance of time, even though his or their enjoyment of it had been suspended for an indefinite series of years. But by the Statute of Limitations of 32 Henry 8, c. 2, it was enacted, that no person shall make any prescription by the seisin or possession of his ancestor or predecessor, unless such seisin or possession hath been within three-score years next before such prescription made: 2 Blackstone Com. 264. By the statute 21 James 1, c. 16, the period within which an action must be brought to recover possession of real estate was reduced to twenty years.

There can be but one actual seisin of an estate. Two persons cannot be actually seised of the same land at the same time, claiming it by title *adverse* to each other: 3 Wash. Real Property 125. At common law seisin was the completion of the feudal investiture, by which the tenant was admitted into the feud, and performed the rites of homage and fealty: Stearns's Real Actions 2. Seisin in deed is said to be actual possession of the freehold, and seisin in law is a legal right to such possession. A constructive seisin in deed is said to be equivalent to an actual seisin: *Green v. Liler*, 8 Cranch 244.

Where two persons are in possession at the same time, under different claims of right, he has the seisin in whom is the true title: 3 Wash. R. P. 128, and cases cited. To constitute an actual disseisin there must not only be an unlawful entry upon lands, but it must be made with the intention to dispossess the owner: 4 Kent Com. 488; *Smith v. Bartes*, 6 Johns. 218; *Bradstreet v. Huntington*, 5 Peters 439; *Ewing v. Barnett*, 11 Id. 41. The *quo animo* in which the possession was taken, is a test of its adverse character, and possession to be adverse must be intended to be in hostility to the true owner; but the question of intention ordinarily, is one of fact, to be submitted to the jury: *Magee v. Magee*, 37 Miss. 149. In the case of *Yetzer v. Thoman*, 17 Ohio St. 133, it was held that under the Statute of Limitations of Ohio, if a party, established in himself, or in connection with those under whom he claims, an actual, notorious, continuous and exclusive possession of land for a period of twenty-one years, he thereby, except as to persons under disabilities, acquires a title to the land, irrespective of any questions of *motive* or *mistake*. Where a party claims by disseisin, which has ripened into a valid title by lapse of time, he must show an *actual, open, exclusive* adverse possession for the length of time required by the statute: *Hawk v. Senseman*, 6 S. & R. 21; *Cal-*

houn v. Cook, 9 Penna. St. 226; *Melvin v. Prop'rs of Locks et al.*, 5 Me. 15; *Cahill v. Palmer*, 45 N. Y. 484; *Robinson v. Luke*, 14 Iowa 424; *Booth v. Small*, 23 Id. 177; *Horbach v. Miller*, 4 Neb. 47. Actual residence upon or enclosure of the land is not necessarily requisite to constitute such possession; acts of notoriety, such as entering upon the land and making improvements thereon, raising crops, felling trees growing on the land, and taxation of the land for a series of years to the person claiming it, and the payment of taxes by him, are competent evidence tending to show adverse possession: *Ellicott v. Deal*, 10 Pet. 412; *Ewing v. Barnett*, 11 Id. 41; *Allen v. Gilmore*, 13 Me. 178; *Little v. Libbey*, 2 Greenleaf 242; *Miller v. Shaw*, 7 S. & R. 136; *Farrer v. Fessenden*, 39 N. H. 277; *Horbach v. Miller*, 4 Neb. 47. The extent of the possession must be determined by the character of the entry. If a party enters under *color of title* by deed or other written instrument and occupies and improves a portion of the land, he acquires actual possession of all the land embraced in his deed or instrument in writing, and this too although the title conveyed by the deed or other written instrument may have no validity: *Prescott v. Nevers*, 4 Mason 330; *Jackson v. Porter*, Paine 457; *Bynum v. Thompson*, 3 Ired. 578; *Webb v. Sturtevant*, 1 Scam. 187; *Kyle v. Tubbs*, 23 Cal. 431; *Welborn v. Anderson*, 37 Miss. 155. The Supreme Court of Alabama say: the whole doctrine of adverse possession rests upon the presumed acquiescence of the owner. Acquiescence cannot be presumed unless the owner has or may be presumed to have notice of the possession: *Benje v. Creagh*, 21 Ala. 151; *Brown v. Cockerell*, 33 Id. 47. But actual notice to the owner of the land is not necessary; notice will be presumed from actual occupation of the land.

Merely taking a deed to land is not sufficient to constitute an adverse possession; it must be followed by an actual entry, and it is only from the time of such entry that the Statute of Limitations begins to run: *Robinson v. Luke*, 14 Iowa 424. If a person is in possession under color of title, and occupying a portion of the premises, it has been held that another person cannot acquire constructive possession by occupying a portion, with color of title to the whole; his possession will be restricted to the part which he actually occupies: *Jackson v. Vermilyea*, 6 Cowen 677. It is held that where possession is claimed of lands held under a color of title, by cultivation of a part, such constructive possession cannot be ex-

tended beyond a single lot of land, or single farm : *Jackson v. Woodruff*, 1 Cowen 286. The rule would be different, however, in case of actual occupancy of a portion of each lot or farm described in the deed. As to what constitutes color of title, the authorities seem to hold that if the title under which the party claims, and under which he entered, shows the character and extent of his claim, it is sufficient to constitute adverse possession : *Bell v. Longworth*, 6 Ind. 273 ; *Doe v. Hearich*, 14 Id. 243 ; *Jackson v. Todd*, 2 Caines 183 ; *Jackson v. Sharp*, 9 Johns. 162 ; 12 Id. 365 ; 16 Id. 298 ; 18 Id. 40, 365.

But it is not enough that a claimant enters under a void deed regularly recorded, and causes a survey to be made of the lands according to the deed, and pays the taxes on the lands for a number of years, they being wild and uncultivated : *Little v. Megquia*, 2 Me. 176 ; *Bates v. Norcross*, 14 Pick. 224. Where a party enters upon land without color of title, his right can never extend beyond the limits actually occupied by him ; *Barr v. Gatz*, 4 Wheat. 213. To constitute such adverse possession as will bar the right of the owner of the estate, it is essential that the possession should be continued for the period prescribed by the statutes. If the continuity of possession is broken before the expiration of the time fixed by the statute, an entry within the time will render the prior possession unavailing : *Pederick v. Searle*, 2 S. & R. 240 ; *Wickliffe v. Ensor*, 9 B. Mon. 253 ; *Holdfast v. Shepard*, 6 Ired. 361 ; *Taylor v. Burnsides*, 1 Gratt. 165 ; *Doe v. Eslava*, 11 Ala. 102. But when one enters upon land claiming title to the same, and continues to reside thereon, he may convey his interest by deed, and if the possession of such person and those claiming under him added together amounts to the time fixed by the Statute of Limitations, such possession is a bar to a recovery : *Overfield v. Christie*, 7 S. & R. 177 ; *McCoy v. Dickenson College*, 5 Id. 254 ; *Fanning v. Wilcox*, 3 Day 269 ; *McNeeley v. Langan*, 22 Ohio St. 37. No possession can be held to be adverse to one who has no right of entry during its continuance ; therefore the Statute of Limitations does not run against a reversioner till the death of the tenant for life, even if the latter has conveyed the estate in fee : *Gernet v. Lynn*, 31 Penn. St. 94 ; *Melvin v. Locks et al.*, 16 Pick. 137 ; s. c. 17 Id. 255 ; *Raymond v. Holder*, 2 Cush. 269. And the reversioner may enter at any time within the period prescribed by the statute after the termination of the particular estate,

notwithstanding there may have been a disseisin of the tenant and an adverse possession for more than the statutory period, because the title of the reversioner did not accrue until the determination of the estate of the tenant. The reason is plain, the doctrine of adverse possession being predicated on presumed acquiescence of the owner of the land, and the owner having parted with the possession to the tenant, was not in a position to enforce his rights. But in cases of rights of way and of common, it has been held that when the tenant suffers a direct and palpable injury to his own possession, that if the landlord had actual knowledge of the injury and submits, he will be bound: *Daniel v. Nott*, 11 East 371. And it has been held that when a disputed boundary line has been adjusted by the agreement of the tenant for life, that such agreement is presumptive evidence to bind the remainder-man: *Saunders v. Annesley*, 2 Sch. & Lef. 101.

The authorities uniformly hold that a tenant cannot set up his possession as adverse to his landlord so long as the relation of landlord and tenant continues to exist. But he may show that his landlord's title has terminated, after which he may disclaim the tenancy and make his possession adverse: *Nellis v. Lathrop*, 22 Wend. 121; *Mattis v. Robinson*, 1 Neb. 5. If the tenant purchases a better title than that of his landlord, he must surrender possession to his lessor before he can avail himself of his new title: *Mattis v. Robinson*, *supra*. As between trustee and *cestui que trust*, so long as the trust is a continuing one, and is acknowledged and acted on by the parties, the statute does not begin to run; but when it is disavowed by the party in possession, whether it be the trustee or *cestui que trust*, and he distinctly with the knowledge of the other, disclaims to acknowledge the trust and to hold under it, then the possession from that time becomes adverse: *Newmarket v. Smart*, 4 Am. Law Reg. 400, and cases cited. But until the trust is disavowed, it continues to subsist, and mere lapse of time, however great, is no bar: *Paschall v. Hinderer*, 28 Ohio St. 568. Questions have arisen where the Statute of Limitations has been changed from twenty-one to ten years during the time a party was holding adversely, as to the limitation applicable to the case. It being competent for the legislature to change statutes prescribing limitations to actions, the one in force at the time suit is brought is the one applicable to the cause of action: *Bigelow v. Beman*, 2 Allen 497; *Horbach v. Miller*, 4 Neb. 457. The legislature cannot

remove a bar or limitation which has already become completed, and can pass no law to take effect on existing claims without allowing parties a reasonable time in which to bring their action before such claims shall be barred by the new enactment; but within these limits there is no restriction on the power of the legislature. Laws quieting a long and undisputed possession of real estate are generally favored. Such laws give stability to titles, encourage improvements, and prevent the assertion of stale titles and claims. When it is clear that the party in possession has brought himself within the provisions of the statute, courts should have no hesitation in declaring him the lawful occupant. In *Spring v. Gray*, 5 Mason 523, Judge STORY says: "I consider the Statute of Limitations a highly beneficial statute, and entitled, as such, to receive, if not a liberal, at least a reasonable construction in favor of its manifest object. It is a statute of repose, the object of which is to suppress fraudulent and stale claims from springing up at great distances of time, and surprising the parties, or their representatives, when all proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time, or the defective memory, or death or removal of witnesses." S. M.

FREMONT, Neb.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

HOAG v. LAKE SHORE AND MICHIGAN SOUTHERN RAILROAD COMPANY.

In questions of negligence, it is generally the province of the jury to determine the proximity of the cause to the injury complained of; where, however, the presence of an intervening agency is obvious, arising upon undisputed facts, the court should take the case from the jury.

Defendants' railroad ran along the bank of Oil creek; by reason of a landslide, unseen by the engineer, an oil train was thrown from the track, the tank cars burst, and the oil taking fire floated down the stream, causing the destruction of plaintiff's buildings, several hundred feet distant from the place of the railroad accident:

Held, that the burning of plaintiff's buildings was not such a natural and probable consequence of the negligence of defendants' engineer (if negligence there were), as ought to have been foreseen by him as likely to flow from his act, and, therefore, plaintiffs could not recover.

Held further, that, the facts being undisputed, the evidence was properly not submitted to the jury.

Penna. Railroad Co. v. Hope, 80 Penn. St. 373, distinguished. *Penna. Railroad v. Kerr*, 62 Penn. St. 353, followed.

ERROR to the Common Pleas of Venango county.

This was an action on the case to recover compensation for certain property destroyed by fire, caused, as was alleged, by the negligence of the defendants. The facts were as follows : The plaintiffs were the occupiers of a piece of land situate within the limits of Oil City, on the western bank of Oil creek. The railroad of defendants is constructed along said creek, over the land of the plaintiffs, and at the base of a high hill. On the afternoon of April 5th 1873, during a rain storm, there was a small slide of earth and rock from the hill-side down to and upon the railroad. About ten minutes prior to the accident one of the defendants' engines had passed over the road in safety ; at that time no slide had occurred. This engine was followed in a few minutes by another engine, drawing a train of cars loaded with crude oil in bulk. The latter engine ran into the slide, was thrown off the track, ran on about one hundred to one hundred and fifty feet, when the tender, which was in front of the engine, was overturned into Oil creek ; the engine itself was partly overturned ; two or three oil cars became piled up on the track and burst. The oil took fire, was carried down the creek, then swollen by the rain, for several hundred feet, set fire to the property of the plaintiffs, and partly consumed it. The court below, on these facts, directed a verdict for defendants.

C. W. Mackay, for plaintiffs.

McCalmont & Osborn, for defendants.

The opinion of the court was delivered by

PAXSON, J.—The question of negligence in defendants' engineer in not seeing the obstruction and stopping his train before reaching it, is not raised upon this record, and need not be discussed. The only question for our consideration is whether the negligence of the defendants' servants was the proximate cause of the injury to the plaintiffs' property. The answer to the plaintiffs' third point, embraced in the second specification of error, raises this question distinctly. The court was asked to say : " That, if the jury believe from the evidence that the accident complained of was the result of negligence on the part of the defendants, and that, by reason of such negligence, the oil, ignited by the engine attached to the train, ran immediately down to Oil creek, where it was carried by the current, in the space of a few minutes, to the property of the

plaintiffs, when it set fire to and destroyed said property, the plaintiffs are entitled to recover, provided they did not in any manner contribute to said accident." The court answered this point in the negative, and then instructed the jury that as a matter of law upon the facts in the case the plaintiffs were not entitled to recover; which instruction is assigned here for error.

It was strongly urged that the court erred in withdrawing the case from the jury, and the recent cases of *Pennsylvania Railroad Co. v. Hope*, 80 Penn. St. 373, and *Raydure v. Knight*, 2 W. N. C. 713, were cited as supporting this view. In the case first cited it was said by the Chief Justice, in delivering the opinion of the court: "We agree with the court below that the question of proximity was one of fact particularly for the jury. How near or remote each fact is to its next succeeding fact in the concatenation of circumstances from the prime cause to the end of the succession of facts which is immediately linked to the injury, necessarily must be determined by the jury. These facts or circumstances constitute the case and depend upon the evidence. The jury must determine, therefore, whether the facts constitute a succession of events so linked together that they become a natural whole, or whether the chain of events is so broken that they became independent, and the final result cannot be said to be the natural and probable consequence of the primary cause, the negligence of the defendants." The case of *Raydure v. Knight* was meagerly presented; the charge of the court was not sent up, and a majority of the court were of opinion that no sufficient cause for reversing the judgment had been shown. I am unable to see any special bearing this case has upon the question before us. The doctrine laid down in *The Railroad Co. v. Hope*, and to be gathered incidentally perhaps from *Raydure v. Knight*, is, that the question of proximate cause is to be decided by the jury upon all the facts in the case; that they are to ascertain the relation of one fact to another and how far there is a continuation of the causation by which the result is linked to the cause by an unbroken chain of events, each one of which is the natural, foreseen and necessary result of such cause. But it has never been held that when the facts of a case have been ascertained, the court may not apply the law to the facts. This is done daily upon special verdicts and reserved points. Thus, in *The Railroad Co. v. Kerr*, 62 Penn. St. 353, a case bearing a striking analogy to this, the court submitted the question of negligence to the jury,

but reserved the question of proximate cause upon the undisputed facts of the case. Of course, this could not have been done if the facts were in dispute. A reserved point must be based upon facts admitted in the cause or found by the jury. In questions of negligence it has been repeatedly held that certain facts when established amount to negligence *per se*: *Railroad Co. v. Stinger*, 78 Penn. St. 219; *McCully v. Clarke*, 4 Wright 399; *Pennsylvania Railroad Co. v. Bennett*, 59 Penn. St. 259; while in *Raydure v. Knight*, *supra*, the court below, in answer to the defendants' second point, instructed the jury that if certain facts were believed by them, the negligence complained of was the proximate cause of the injury to plaintiffs' property. This ruling was affirmed by this court. I do not understand the decision in *The Railroad Co. v. Hope* to be in conflict with this view. It remains to apply this principle to the case before us. There is not a particle of conflict in the evidence so far as it affects the question of proximate cause. This was doubtless the reason why the plaintiffs assumed the facts in their third point. They would not have been justified in doing so had not the facts been admitted, nor is it likely the learned judge would have answered it. We may, therefore, regard the plaintiffs' third point as a prayer for instructions upon the undisputed facts of the case. Can it be doubted that the court had the right to give a binding instruction? We think not.

But one question remains; was the negligence of the defendants' servants, in not seeing the land-slide and stopping the train before reaching it, the proximate cause of the destruction of the plaintiffs' property? We need not enter into an extended discussion of the delicate questions suggested by this inquiry. That has been done so fully in two of the cases cited as to render it unnecessary. A man's responsibility for his negligence and that of his servants must end somewhere. There is a possibility of carrying an admittedly correct principle too far. It may be extended so as to reach the *reductio ad absurdum* so far as it applies to the practical business of life. We think this difficulty may be avoided by adhering to the principle substantially recognised in *The Railroad Co. v. Kerr*, and *The Railroad Co. v. Hope*, *supra*, that in determining what is proximate cause, the true rule is, that the injury must be the natural and probable consequence of the negligence, such a consequence as under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely

to flow from his act. This is not a limitation of the maxim *causa proxima non remota spectatur*; it only affects its application. There may be cases to which such a rule would not apply, but this certainly is not one. It would be unreasonable to hold that the engineer of the train could have anticipated the burning of the plaintiffs' property as a consequence likely to flow from his negligence in not looking out and seeing the land-slide. The obstruction itself was unexpected. An engine had passed along within ten minutes with a clear track. But the obstruction was there, and the tender struck it. The probable consequences of the collision, such as the engineer would have a right to expect, would be the throwing the engine and a portion of the train off the track. Was he to anticipate the bursting of the oil tanks, the oil taking fire, the burning oil running into and being carried down the stream, and the sudden rising of the waters of the stream, by means of which, in part at least, the burning oil set fire to the plaintiffs' building? This would be a severe rule to apply, and might have made the defendants responsible for the destruction of property for miles down Oil creek. The water was an intervening agent, that carried the fire just as the air carried the sparks in the case of *The Railroad Co. v. Kerr*. It is manifest that the negligence was the remote and not the proximate cause of the injury to the plaintiffs' building. The learned judge ruled the case upon sound principles, and his judgment is affirmed.

The doctrine of proximate or remote cause, in reference to liability for damages, has of late received considerable discussion in cases arising out of fires caused by the operation of railroads. The leading cases upon one view of the subject, are, *Ryan v. N. Y. Central Railroad*, 35 N. Y. 210, and *Penna. Railroad v. Kerr*, 62 Penn. St. 353.

Ryan v. New York Central Railroad, 35 N. Y. 210, was a case where the defendant negligently set fire to an adjoining house, and the fire spreading, ignited and consumed a neighboring building; it was held by the court that the cause of the fire was too remote to attach the liability to the defendant. *Penna. Railroad Co. v. Kerr*, 62 Penn. St. 353, was a case where

an engine on the railroad company's track emitting sparks, by negligence set fire to a dwelling close by; the fire from this house was communicated to another house, at some little distance from it; the latter was consumed with all its contents, and it was held that the corporation was not liable in damages for the house and contents thereof last burned. See also *Macom Railroad Co. v. McConnell*, 27 Ga. 481, which was a case involving substantially the same questions of negligence, and in which the same rulings were made as in *Penna. Railroad Co. v. Kerr*.

Penna. Railroad Co. v. Kerr, however, appeared to be somewhat narrowed in its scope by a recent case before the same court; *Penna. Railroad Co. v.*

Hope, 80 Pa. St. 373, in which AGNEW, C. J., stated the rule as to the determination of proximate or remote cause to be "that the injury must be the natural and probable consequence of the negligence, and that this might and ought to have been foreseen under the surrounding circumstances. * * * We agree with the court below that the question of proximity was one of fact, particularly for the jury. How near or how remote each fact is to its next succeeding fact in the concatenation of circumstances, from the prime cause to the end of the succession of facts which is mediately linked to the injury, necessarily must be determined by the jury. These facts or circumstances constitute the case, and depend upon the evidence." But the principal case shows that the court has not receded in any degree from the doctrine of *Railroad Co. v. Kerr*. The effect of the cases in Pennsylvania is that the question of proximate or remote cause is a question of fact to be determined like other facts by the jury from the evidence; but that in this class of cases as in all others, when the facts are agreed upon, or uncontroverted and incontrovertible, the law is to be pronounced upon them by the court. In *Railroad Co. v. Hope*, the facts were left to the jury to find; in *Railroad Co. v. Kerr*, and in the principal case, the facts being agreed or undisputed, the court pronounced the result as matter of law. With this distinction kept in view there is no conflict between the cases.

The authority of the decisions in *Penna. Railroad Co. v. Kerr*, 62 Pa. St. 353, and *Ryan v. N. Y. Central Railroad*, 35 N. Y. 210, was denied in the recent case of *Small v. Chicago, R. I. & P. Railroad Co.*, Supreme Court of Iowa, April Term, 1878. That was a case where the engine on the defendant's track, emitting sparks, set fire to an elevator adjoining the track, which spread from thence to plaintiff's elevator and destroyed it. It was held that the fire

from the locomotive was the proximate cause of the loss, and that the railroad company was liable for the damages thereby occasioned.

In a late case in Kansas, it was held that where two fires were caused by the engines of the defendant corporation, said fires being caused by sparks from the engines, and where neither of the fires originated in plaintiff's land, but were kindled on the lands of different owners, and afterwards spread, and then uniting, and passed over the property of some other landowners, and finally came to plaintiff's property, which was four miles distant from where said fire originated, and burned some out-houses and other property, the court held that the damage was not too remote, and that plaintiff was entitled to recover: *Atcheson, T. & S. T. Railroad Co. v. Stanford*, 12 Kans. 354. In *Peoppers v. Missouri, Kansas & Texas Railroad Co.*, 7 Cent. Law Journal 252, a case where sparks from defendant's locomotive set fire to prairie along defendant's line, and a high wind blowing, the fire extended three miles during the evening, burning slowly during the night—again, in the morning, the wind rising, drove the fire about four miles further, where it reached plaintiff's farm, and destroyed his property; in an action for damages for the destruction of plaintiff's property, in which the question of negligence was raised, held that the facts *prima facie* showed negligence on part of the defendant, and that the damage by the fire must be considered as the direct and natural result therefrom, * * * and that the high wind at that season of the year, although aiding in the spread of the fire, was neither extraordinary or remarkable, and could not be regarded as the introduction of a new agency, so as to relieve the railroad company from the result of the negligence of its servants in permitting the fire to escape from its engine.

In England, in the case of *Jones v.*

Festiniog Railway Co., L. R. 3 Q. B. 133; it is held that a railroad company, having no express authority to use steam or any other power necessitating the use of fire, is liable for any damages occasioned by the escape of fire from its engines without regard to the question of negligence. And this is made expressly so by statute in some of the states. In Maine, see *Stearns v. Atlantic, &c., Railroad Co.*, 46 Me. 95; in New Hampshire, see *Hooksett v. Concord Railroad Co.*, 38 N. H. 242; in Massachusetts, see *Ingersoll v. Stockbridge, &c., Railroad Co.*, 8 Allen (Mass.) 438. Yet in the absence of any such statutory liability, a railroad company, authorized by its charter to use steam power, has necessarily granted, by implication, the right to use the usual and only methods of generating steam; that is, by fire, whether of wood, coal, or other combustible, and is not liable in damages for injuries unavoidably caused by the use of fire used in the generation of steam: *Burlington, &c., Railroad Co. v. Westover*, 4 Neb. 268; *Vaughan v. Taff Vale Railroad Co.*, 5 Hurl. & Norm. 679; *Fremantle v. London & Liverpool Railroad*, 10 C. B. (N. S.) 89. Yet these cases proceed upon the principle that the escape of the fire must be an unforeseen and unavoidable casualty. But in such cases the question of unavoidability is one of fact, to be determined by the jury from all the circumstances; and where a party seeks to recover damages caused by the escape of fire from a railroad company's engines, the burden of proof is upon the party charging negligence to show negligence in the company; for negligence will not be presumed against the company from the mere fact of the injury. Thus in the case of *McCready v. South Carolina Railroad Co.*, 2 Strob. (S. C.) 356, it was held that where the injury complained of was caused by the employees of the company emptying coals from the engine upon defendant's track, on trial

this act was shown to be necessary, and that it was carefully done; court held that plaintiff, under circumstances, as proven, was not entitled to recover. But in the case of *Webb v. Railroad Co.*, 3 Lansing 453, where the coals were negligently dropped from defendant's locomotive, set fire to the ties under its track, and from the track it spread to plaintiff's woodland, and burned the wood to large extent and damaged the soil, plaintiff was held entitled to recover. In a late case in the Supreme Court of the United States, that of *Grand Trunk Railroad Co. v. Richardson*, 1 Otto 454, it was held that whether the destruction of property caused by fire escaped from a locomotive was the result of negligence on part of a railroad company, depends upon the facts shown as to whether or not it used the caution and diligence that the circumstances of the case demanded, or prudent persons ordinarily exercise, and not upon the usual conduct of other companies in the vicinity. See also *Troxler v. Richmond, &c., Railroad Co.*, 74 N. C. 379.

The statutes of several states which have heretofore been adverted to are identical, substantially; they usually, in substance, provide that the railway shall be liable for all damages by fire that is set or caused by operating such railway, and such damage may be recovered by the party damaged in the same manner as the remedy providing for the recovery of the value of stock.

Now the question arises, in case of these remote fires, is the corporation absolutely liable for damages caused by the escape of fire from its locomotives, whether it is guilty of negligence or not? It has been contended by able jurists, that, in such cases, there can be no recovery, unless upon proof of negligence on part of the defendant. They base their position on this argument, viz., this clause fixing the liability of the corporation, is usually in the same chapter with, and frequently forms one

section, together with those clauses fixing the liability for the destruction of stock, and they contend that a railroad company is liable for the destruction of stock on account of its negligence in not fencing its track; that the very fact of the absence of a fence, by itself, constitutes negligence, and, consequently, in case of fire, there can be no recovery against the company unless some negligent act can be proven or inferred. They conclude, from this, that as the cases contemplated in the section, or that part of the section relating to the destruction of stock, depend for a recovery on the proof of negligence, those for damages in case of fire must be dependent on proof of the same fact, and that damages in the latter case are recoverable by the language of the section in the same manner as the first.

Now, then, admitting it to be true that in an action for the recovery of the value of stock killed, the proof of negligence must be made to entitle plaintiff to recover; the assumption is, that, the negligence for the injuries to the stock, consists in the failure to fence. In the absence of a fence, the stock are permitted to go upon the track; the negligence consists in the omission to fence. Now why is not the same negligence found in the act of permitting the escape of fire? Injury results in its escape. Why could not the corporation prevent it? But it might be urged that the fire might escape through accident. But this should not excuse the corporation any more than running through the corporate limits of a town, through oversight or mistake, at a forbidden rate of speed, would excuse the killing of stock, while running at such rate of speed. The acts of permission in these two cases are of the same character; that is, in permitting stock to run on the track, by which permission the stock is injured; the permission of fire to escape by which property is destroyed. It may be contended that the company

cannot dispense with the use of fire, it being necessary in the running of engines, and when in use, especially in the engines, liable to accidentally escape, and cannot be controlled with absolute certainty. But the law holds the escape of the fire to be *per se* negligence. It cannot admit of any such conclusion as an unavoidable and unforeseen escape of the fire. Contrivances may be applied to locomotives which would as effectually prevent the escape of sparks and coals as a good fence would prevent cattle from going upon a railroad track.

The argument may be more successfully refuted by denying the premises on which it is laid. The statute imposing liabilities on railroad corporations for stock killed by negligence of the company, does not require fences to be built. The right of action for damages for stock injured, depends on the negligence of the company in not building a fence. These statutes simply create a liability for damages caused by the killing of cattle where no fences are built; for there is no violation of the statute in an omission to fence; there are no rights involved therein, and the companies, if they refuse to fence their track, do no more than exercise a right, which the statute under consideration in no wise abridges or abrogates. When the law does not forbid an act, and when it is done in the exercise of a right, how can it be said to be negligence, especially when the doing of the act does not conflict with the rights of any one else?

As to the liability created by such a statute; at points along its line where it has the right to fence, and no fence is erected, a railroad corporation would be liable for stock killed. The statute applies to no other cases. Now, in regard to the remedy, negligence need not be shown; the proof of the injury or destruction of the property, by the owner, will entitle him to a recovery. Now it

naturally follows as a consequence of all this, that the right to fence, and the fact whether or not there is a fence at all, has no reference, whatever, to care or negligence. But in any one of the sections or clauses of the section of the statutes now under consideration, there is no condition accompanying the act of setting on fire necessary in order to create liability. It is absolute and unconditional, and dependent on no facts or cir-

cumstances; it is simply dependent on the fire alone. The provision does not relate to the liability, but only to the remedy. Whatever pertains to the remedy in the other sections, or to the remedial part of the same section, is referred to in this, and nothing else. From this it will readily be seen that no idea of negligence enters into the provision creating liability on account of fire.

C. M. DUNBAR.

Court of Appeals of Kentucky.

SAWYER ET AL. v. TAGGART.

An executory contract for the sale of chattels, to be delivered in the future is valid although the seller does not have them, nor any means of getting them at the date of the contract.

But an understanding between both the vendor and the purchaser, when the contract is made, that the property shall not be delivered, but that the one will pay, and the other receive the difference between the contract and the market price at the maturity of the contract, renders the transaction a mere wager and illegal.

If however either party contracts in good faith, a subsequent agreement that the property may be re-sold before the time of delivery arrives, or that the contract shall be settled by an adjustment and payment of differences, will not affect the validity of the original contract.

A party ordering a re-sale of property before the contract time for delivery arrives will be liable for all losses thereby sustained.

The delivery of a warehouse receipt for a given number of barrels of pork, which is only a parcel of a larger lot stored together, where there is nothing to indicate the specific barrels embraced in the receipt, will not create a lien in favor of the holder of the receipt.

THIS was an action by Taggart, the appellee, to settle and enforce a trust as assignee for the benefit of creditors of Hamilton & Co.

The facts as they appeared in the answer and proofs were as follows: Hamilton & Co., who were commission merchants in Louisville, had from time to time, commencing in December 1875, directed Sawyer & Co. (appellants), who were commission merchants and members of the Cotton and Produce Exchanges of New York, to buy for them in New York, for future delivery, certain specified quantities of cotton, pork and lard. Purchases were made as directed, and Hamilton & Co. were notified of the act. The rules of the exchanges where the cotton, pork and lard were pur

chased, required all such contracts to be made in the names of members of those exchanges, respectively, and Hamilton & Co. not being members, the contracts were made in the name of Sawyer & Co. as buyers. When the time for the delivery of each successive purchase was near at hand, Sawyer & Co. were directed to "transfer" it to a subsequent month. A direction to "transfer" a purchase deliverable in one month to a subsequent month, as defined by the evidence, amounted to a direction to resell the commodity, and purchase a like quantity, deliverable in the month indicated.

The contracts for cotton were expressed to be made "in view of, and in all respects subject to the rules and conditions established by the New York Cotton Exchange, and subject to, and in all respects in accordance with art. xviii of the by-laws," and these for pork and lard "in view of, and in all respects subject to the by-laws and rules of the New York Produce Exchange," in force at the date of the contracts respectively.

Under these rules, contracts for future delivery designate the month within which delivery shall be made, and the time of delivery within the month is at the seller's option, on five days' notice for cotton, and three days' notice for pork and lard. A buyer holding such a contract, and desiring to "transfer" it to some future month, offers the commodity contracted for, for sale on the exchange, and transfers his contract to the purchaser, who, by the rules of the exchange, becomes bound to receive the property from the original seller and pay for it at the original contract price, and if the prices he agrees to pay his immediate vendor be less than the latter agreed to pay the original seller, then the party reselling pays the difference to his vendee. The contracts made by Sawyer & Co. for Hamilton & Co., being in the name of the former, when in making "transfers" they sold at less than they had agreed to pay, they were required to and did pay to the purchaser from them the difference. For the money thus paid by them, and for brokerage and other expenses, they claimed to be allowed as creditors of Hamilton & Co. In the settlement of appellee's account as assignee, the court below rejected the claim, whereupon Sawyer & Co. appealed to this court.

The opinion of the court was delivered by

CORER, J.—The ground upon which the claim of appellants was resisted by the appellees and rejected by the court was, that the

purchases of cotton, pork and lard were not made in good faith, with an intention that the commodities bought should be delivered and paid for according to the tenor of the contracts, but that it was understood by both Sawyer & Co. and Hamilton and Co., and those with whom contracts of purchases were made, that the commodities purporting to be bought and sold, would not be delivered or paid for, but that in lieu of delivery and payment, the contracts were to be settled by the payment by one party and receipt by the other, of the differences between the contract and the market price on the days when by the terms of the contracts they were to have been performed.

All the purchases were for delivery at a future date, and there is nothing in the record to show that the several vendors at the time of making sales, had in possession or had contracted for the goods they agreed to sell, or that they had any means of getting them, except by purchasing in the market. This, however, cannot constitute any valid objection to the contracts, for it is now well settled by the authorities, both in this country and in England, that executory contracts for the sale of goods for future delivery may be valid, although the seller has them not at the date of the contract, and has no means of getting them except by subsequent purchases. *Whitehead v. Root*, 2 Met. 587; *Hibblewhite v. McMorine*, 5 M. & W. 462; *Grizewood v. Blaine*, 11 C. B. 526; *Brown v. Speyer*, 20 Gratt. 309; *Stanton v. Small*, 3 Sandford 230; *Smith v. Bouvier*, 70 Penn. St. 330.

Nor do we understand learned counsel for the appellee to controvert this; but they claim that the contracts were illegal solely on the ground that there was no intention upon the part of either seller or purchaser to deal in the goods contracted for, and that it was understood between them that the contracts were not to be performed by delivery and payment, but were to be settled by the payment of differences.

Counsel for the appellants concede that such contracts, however formal and regular on their face, are mere wagers, and that if the laws of the state of New York declare wagering contracts void, then these contracts are void if they are of the character claimed by the counsel for appellee; but they deny that there is sufficient evidence that they are of that character, and they also claim that, as there is no evidence in the record that the statutes of New York forbid the making of wagering contracts, and as the courts of this state cannot take judicial notice of the statutes of another state,

we must presume the common law to be in force in New York, and that, as wagers are valid at the common law, we must hold the contracts in question, even if mere wagers, to be valid by the laws where made, and therefore as not invalid here.

But waiving the question as to the validity at the common law of mere wagers on the market price of goods which constitute leading articles of commerce and are prime necessities of life, and assuming for the purposes of this case, that such contracts are prohibited by the statutes of New York, we proceed to the inquiry whether these contracts were mere wagers. But before examining the evidence relied upon to establish the illegal character of the contracts, we will first ascertain the distinction between wagers on the market price and valid speculative contracts.

We have already seen that an understanding between the vendor and purchaser, that the goods shall not be delivered, but the one will pay and the other will receive the difference between the contract price and the market price on the day of the maturity of the contract, renders the transaction a mere wager. But such must be the understanding of both parties. "The intention of the parties gives character to the transaction, and if either party contracted in good faith, he is entitled to the benefit of his contract, no matter what may have been the secret purpose and intention of the other:" *Pirley v. Boynton*, 79 Ill. 353.

So also it is well settled that the fact that the purchaser may have intended not to receive the goods, but to resell them before the time for delivery, and even though the seller knew that such was his intention, the transaction will not be deemed gambling. *Ashton v. Daken* 4 H. & N 867, is a strong case in support of this conclusion. There the plaintiff bought stock for the defendant. "The defendant never in fact at any time intended to take a transfer or call on the plaintiff to deliver the stock. The plaintiff was fully aware of this when the orders were given, and they were accepted on the implied terms and understanding that the plaintiff should not be called upon by the defendant to deliver the stock * * * and that the defendant should not be called on to pay for the same * * * but that they should be resold by the plaintiff for the defendant before the time of payment arrived; and the defendant should, on the resale, either pay or receive the difference, after debiting him with the plaintiff's charges on the purchase and resale." This was held clearly not a gambling transaction. See also to the same effect, *Smith v. Bouvier*, 70 Penn. St. 330.

The conclusion reached in these cases seems to us to be rational and just. What valid objection can exist to such transactions? As we have already seen by the terms of the contracts and rules of the exchanges, when there is a resale of goods bought for future delivery the sub-purchaser becomes bound to receive and pay for the goods. The original contract is thus kept in force and ultimately to be performed, and the intention of the original purchaser to resell before the date for delivery, even if known to the seller, does not render the transaction fictitious. It cannot be material whether the contract is finally performed by the original parties or by others whom they have procured to perform it in their stead.

It seems to us, therefore, that the correct rule is this: When the contract, on its face, and according to the customs of the trade, with reference to which it may be shown to have been made, is capable of being enforced by either party against the other, it is a lawful contract, unless at the time of entering into it there was an agreement or understanding between the parties that it should not be performed according to its tenor, either by them or others, to be procured by them; but if the understanding and intention of both parties at the time of making the contract was that they were neither to perform it themselves nor to procure others to perform it for them, or if by the like understanding either party may elect before the time of performance, not to perform his part, and discharge himself by the payment of the difference between the contract price and the market price at time of exercising his option, or at the maturity of the contract, the transaction is a mere wager.

Testing the case at bar by this rule, we think there will not be much difficulty in reaching a satisfactory conclusion.

The evidence establishes, we think, with absolute certainty, that Hamilton & Co. did not intend to receive the goods they purchased, but intended to resell them before the day of delivery, and from the correspondence between the parties, their previous dealings and other circumstances in evidence, we are equally well satisfied that Sawyer & Co. knew such was their intention and acquiesced in it. But we have seen that if the purchases in question had been made by Hamilton & Co., directly from Sawyer & Co., with the understanding between them which we have seen existed, the contracts would not have been invalid, because of the intention, known to both parties, not to receive but to resell the goods. It will, however, be borne in mind, that Sawyer & Co. made no sales to Hamilton & Co.; that the relation between them was that of prin-

cipal and agent, and not that of buyer and seller. Sawyer & Co. were the ostensible buyers, and the validity of the contracts made by them, must be tested by the agreements and understanding between them and those from whom they bought, and cannot be in any way affected by the understanding between them and their principal. There is no direct evidence conducing in any degree whatever, to show that there was any understanding or agreement respecting these transactions between the parties to them, except such as are expressed in written memorials and the rules of the exchanges and the usages of trade in New York.

Counsel for appellees contend, however, that the rules of the exchanges and the customs of trade are sufficient to show that the parties to these contracts never intended they should be performed except by the payment of differences, and that either of the parties might have elected at any time to cancel the contracts by paying the difference between the contract price and the market price, at the time of such election. The evidence shows that nearly all the sales in New York of cotton, pork and lard, for future delivery, are made on 'change, upon contracts in all respects precisely like those in question, and if these were illegal then all are illegal. The evidence also shows, that producers and dealers sell, and exporters, manufacturers and dealers buy on 'change, to a very large extent. This is wholly inconsistent with the idea that all such contracts are mere wagers, and that none of them are enforceable, and of itself furnishes strong reason for suspecting that counsel are mistaken in the conclusion they have reached, that these contracts are mere illegal wagers.

There is, no doubt, much most iniquitous and pernicious gambling in the city of New York, and indeed in all the large cities in this country, on the prices of all the leading articles of commerce; but that all the contracts made upon two of the principal exchanges of the commercial metropolis of the country are of that character, is not to be credited without the most convincing evidence.

Counsel claim that the evidence shows that a very large per cent. of the contracts for future deliveries are settled by the payment of differences. This is no doubt true, but does not warrant the conclusion that all such contracts are made with the intention on the part of both buyer and seller that they shall be so settled; and unless such intention and understanding exist at the time of entering into the contract, the subsequent agreement and actual settlement in that way does not affect the validity of the original contract.

That the parties to a contract may lawfully cancel it on such terms as they may agree on will not be questioned, and the only effect the fact that many contracts for future deliveries are so cancelled can have in this case, is as evidence conducing to prove that these contracts were made on an understanding and agreement that they should be so settled. But giving to this fact all the weight to which it is entitled, it falls far short of establishing the alleged vice in the contract in question against the direct and positive testimony of all the parties to them who have been introduced as witnesses, and against the further fact already adverted to, that large quantities of cotton and pork and lard are constantly being delivered and paid for under similar contracts.

Nor do we find anything in the rules of the exchanges made part of the contracts warranting the conclusion that there was an agreement for a mere payment of differences, or that either party had the option without such agreement to cancel the contracts by paying or demanding the payment of differences.

Rule 4 of the Cotton Exchange provides that "either party to a contract may close or cancel the same by giving notice in writing to the opposite party any day before notice of delivery has been given." But the rule goes on to provide that "the party to whom notice is given has the option either to make settlement (which the evidence shows means to pay or receive the difference), or to receive a satisfactory contract made equal to that held by him." The party giving the notice has a right to cancel his contract by an adjustment of the difference only in the event the other party agrees to accept that mode of settlement; but if the other party choose, he may demand another contract in all respects equal to that to be cancelled, and unless such contract be furnished, he may hold on to the one he already has and enforce it.

The same rule also provides for cancelling contracts in other cases, but these provisions have no application to this case.

Counsel for the appellee cite *Saunders v. Shaw*, 101 Mass. 145; *Cassard v. Hinman*, 1 Bos. 201; *Brua's Appeal*, 55 Penn. St. 296; *Kirkpatrick v. Bonsall*, 72 Penn. St. 155; *Armory v. Gilman*, 2 Mass.; *Lyon v. Culbertson*, 83 Ill. 34, and some other cases in support of their position in regard to these contracts. It would extend this opinion too much to discuss all these cases, but they have been carefully read and considered, and none of them are regarded as in conflict with the conclusion we have reached. They all decide that wagering contracts are void, but they do not

any of them define a wagering contract materially different from the way in which we have defined it. The difference, and only material difference, between those cases and this is the conclusion reached as to the character of the contracts in question, and not as to the rule applicable to them when their character is ascertained.

The contracts made by Sawyer & Co. having been entered into by them for and under the direction of Hamilton & Co., and being valid and enforceable against Sawyer & Co., they were bound when they resold, to pay the losses sustained. When the resales were ordered by Hamilton & Co., the prices had declined below the contract prices, and this fact must have been known to them, and they also evidently knew that the difference must be met, and their directions to resell were equivalent to requests to pay these differences, and the law would imply a promise to reimburse them, and, beside this, Hamilton & Co. actually so promised and paid a part and gave their negotiable securities for another portion, and, as is evident from the record, were only prevented from paying the whole, by their failure in business.

We are, therefore, of the opinion, that for all the money paid by them in adjusting the losses on resales, and for brokerage and other proper expenses of these transactions, they are entitled to share equally with the other creditors of Hamilton & Co. But they are not entitled to any preference on account of the warehouse receipt delivered to them as security for those advances. It is for 1000 barrels of mess pork, which the evidence shows was a part of a much larger quantity similarly branded and stored together, and there is nothing in or on the receipt to indicate the particular barrels embraced by it, or to distinguish them from the residue of the lot. Such a receipt created no lien: *May v. Hoagland*, 9 Bush 172; *Brown v. Childs*, 2 Duv. 315.

Judgment reversed and cause remanded for judgment in conformity to this opinion.

A large amount of litigation has arisen in this country out of questions concerning the effect and validity of contracts for the sale and future delivery of personal property. It may subserve therefore a useful purpose to call attention to the later cases elucidating the doctrine of the principal case, and pointing out the distinctions which have now become es-

tablished by the adjudged cases. Much discussion has ensued upon the question whether time sales or option sales, of chattels, are not wagering contracts, and therefore illegal. And many of the cases do not clearly recognise the distinctions upon which the validity of such contracts depend.

An option sale is valid where the only

option given is, that the seller may deliver any time he chooses, between certain dates agreed upon : *Logan v. Musick*, 81 Ill. 415 ; *Wolcott v. Heuth*, 78 Id. 433. But a sale, where the option is that the seller may deliver the property, or never deliver it, just as he may choose, is in general, invalid. Of this class are what are called "puts" and "calls." A "put" is a privilege given for a nominal consideration of delivering, or not delivering, as the purchaser may elect, of a quantity of grain, or other commodity, within a certain time, at a specified price ; the party giving the privilege, agreeing that if delivery be made within the specified time he will take it and pay for it at the price named. And a "call" is a privilege on the part of the purchaser of it, of calling or not calling for the delivery of the commodity with reference to which the contract is made : *Ex parte Young*, 6 Bissell 53 ; *Pixley v. Boynton*, 79 Ills. 533 ; *In re Chundler*, 13 Am. Law Reg. N. S. 310. The interest of the holder of the "put" always is to break down the price of the commodity, and that of the seller to maintain the price ; while in the case of a "call" the interest of the seller and of the purchaser is reversed. In either of these cases large transactions may be nominally had without any actual transfer of property, and in the case of the great staples of the world, like grain, provisions and cotton, may produce great fluctuations in prices, to the serious detriment of legitimate trading, and of the proper distribution of these commodities, among the masses who either manufacture or consume them. Hence it is on the ground of public policy that such contracts are held void by the common law, as being mere betting upon prices.

There is another class of contracts which are regular upon their face, but which have been held invalid, from the circumstance that at the time they were made, it was the intention and under-

standing of the parties that the property should not be delivered, but that the difference between the market price on the day of delivery, and that stipulated in the contract should be paid by one of the parties to the other, according as such market price might exceed or fall short of that stipulated. The principal case asserts this doctrine. *Brua's Appeal*, 55 Penn. St. 298 ; *Cossard v. Hinman*, 1 Bosworth (N. Y.) 207 ; *Lyon v. Culbertson*, 83 Ills. 38 ; *Pickering v. Cease*, 79 Ills. Rep. 238 ; *Tenney v. Foote*, 11 Chicago Legal News 71.

The principal case also properly notes the limitation of this doctrine, which is, that if the purchaser of the commodity in good faith intends to receive it, it is not an illegal or gambling contract, no matter what may have been the secret intention of the seller : *Pixley v. Boynton*, *supra* ; *Lehman v. Strassberger*, 2 Wood's Cir. Ct. Rep. 557 ; *Clark, Assignee, v. Foss*, 10 Chicago Legal News 211.

The doctrine of the principal case is generally recognised, that a contract for the sale of goods to be delivered at a future day is not invalidated by the circumstance that at the time of the contract the vendor neither has the goods in his possession, nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them by the time appointed for delivering them, otherwise than by purchasing them after making the contract : *Ex parte Young*, *supra* ; *Clark, Assignee, v. Foss*, *supra* ; *Porter v. Viets*, 1 Bissell 177 ; *McIlvane v. Egerton*, 2 Robertson 422 ; *Sanborn v. Benedict*, 78 Ills. Rep. 309 ; *Logan v. Musick*, *supra*, and cases cited in principal case.

In many cases parties at a distance have employed brokers to make time sales and purchases of commodities at the centres of trade, and losses have occurred, and the question has arisen whether such brokers were entitled to recover from their principals for such

losses. Upon this point the doctrine of both the English and American cases is, that if an agent advances money for his principal, though it be to pay losses incurred in an illegal transaction, and he thereafter executes his note, or promises to reimburse his principal, or if knowing the facts, he fails to repudiate, or object to the proceedings until the transaction is closed, he will be bound to his agent for whatever loss the latter may have sustained. *Faikney v. Reynons*, 4 Burrow 2067; *Petre v. Hannay*, 3 Term R. 418; *Tenant v. Elliott*, 1 Bos. & Pul. 3; *Owen v. Davis*, 1 Bailey S. C. 315; *Armstrong v. Toler*, 11 Wheaton 274; *Ramsey v. Berry*, 65 Maine 570; *Durant v. Bart*, 98 Mass. 161; *Knight v. Cambers*, 15 C. B. 563, (80 Eng. Com. Law 561); *Jessopp v. Lutryche*, 10 Exch. 617; *Rosecranner v. Billing*, 15 C. B. N. S. 316, (109 Eng. Com. Law 316). In the last cited case plaintiff declared for money paid for the defendant at his request. Defendant pleaded *inter alia* that plaintiff was a mining share agent, and that after the passage of the statute 8 & 9 Vict. ch. 109, he had contracted for defendant with certain persons concerning mining shares, agreeing that if the value of the shares should be lower on a future day named than at the date of the wagering contract, defendant should receive from such persons the difference, and *vice versa*; that it was never intended that any shares should be bought or sold, as plaintiff well knew, but that differences only should be received or paid; that the money paid by plaintiff was paid in settling and discharging differences in such wagering contracts, which were made by plaintiff in his own name, as was the custom among mining share agents, without disclosing the name of defendant. Plaintiff demurred to the plea and the demurrer was sustained. ERLE, C. J., says: "Here the plaintiff paid the differences according to the result, and at the defendant's request.

I am clearly of the opinion, that, if a man loses a wager, and gets another to pay the money for him, an action lies for the recovery of the money so paid. In *Jessopp v. Lutryche* and *Knight v. Cambers*, the Court of Exchequer and this court both say that the plaintiff was entitled to judgment on the ground that the money was alleged to have been paid at the request of the defendant, and that there was nothing to show that there was any illegality. These cases are in point to show this to be a bad plea. I should incline to think, that, if one requests another to make a wagering contract on his account, and pay the loss, if loss happens, that would be a continuing request to pay until revoked. If the party were a broker, who by the usage of the share-market was bound in all events to pay, it might be a question whether the principal could be allowed to rescind."

In *Lehman v. Strassberger*, Lehman Bros., cotton factors in New York, were employed by Strassberger, a resident of Alabama, to buy and sell cotton for him for future delivery, with the understanding, that there was to be no delivery, but that differences were to be paid, unless there were special instructions to the contrary that Lehman Bros., in accordance with the rules of the cotton exchange, made contracts for cotton with other parties not disclosed, which resulted in losses that Lehman Bros. paid, and thereafter Strassberger executed his note to them for the amount thereof; *held*, Strassberger was liable for such losses; that the court was not called upon to enforce a contract which might have been illegal, as a wagering contract between Lehman Bros., and those with whom they bought or sold cotton, but simply enforcing the collection of a note, the consideration of which was money advanced and services performed by agents for their principal: *Lehman Bros. v. Strassberger*, 2 Wood's Cir. Ct. 562.

Again, a party conversant with the rules and usages of an organization like the Board of Trade in Chicago, who buys or sells thereon through a commission merchant, for future delivery, will be bound by the usages of such board. And in such case, if a commission merchant purchase grain on the market for his customer, the latter putting up margins, knowing that he was required to keep the same good, in case of a decline in the market, then if he fail to do so, after reasonable notice to him, the merchant will have the right to sell on the market and charge the losses to the purchaser: *Curbett v. Underwood*, 83 Ills. 324.

Contracts of sale for future delivery may be legitimate upon their face and yet they may be shown by extraneous evidence to be illegal. In a case in Pennsylvania the contract was, that "in consideration of \$1000, the defendants, Nov. 10, 1870, agreed to deliver to plaintiff 5000 barrels of oil, at any time within the first six months of 1871. If this oil is called for, this call becomes a contract; ten days' notice shall be given, and (the plaintiff) or his assigns agree to receive and pay for the same, cash on delivery, at 10½ cents per gallon, etc." *Held*, not to be on its face a gambling contract, but that its character might be weighed in connection with other evidence on the question whether the transaction was a gambling scheme; *Kirkpatrick v. Bonsall*, 72 Penn. St. 155.

Much legislation has been enacted prohibiting wagering or gambling contracts. The disasters resulting from speculation in stocks in connection with Law's South Sea Bubble led to the enactment of the statute of 7 Geo. 2, ch. 8, in 1734. It declared absolutely void all contracts upon which any premium should be given "for liberty to put upon, or to

deliver, receive, accept or refuse any public or joint stock, or other public securities whatsoever, or any part, share or interest therein, and also all wagers and contracts in the nature of wagers, and all contracts in the nature of puts and refusals relating to the then present or future price or value of any such stock or securities." It fixed a penalty of 500*l.*, for the making of such contracts, and also prohibited under penalty of 100*l.* the payment or receipt of money "for the compounding, satisfying, or making up of any difference for the not delivering, transferring, having or receiving any public or joint stock, or other public securities, or for the not performing of any contract or agreement, so stipulated and agreed to be performed."

Other statutes have been passed in England and in the leading American states having the same general object, and with more or less stringent provisions, and some of them enacted to control wagering contracts in specific commodities. But it is believed that these statutes in this country for the most part only prohibit speculation in prices where the property itself is neither transferred nor intended to be, but only the privilege given to buy or to sell in the future, to be exercised, or not to be exercised, to be enforced, or not to be enforced, as the buyer or seller may elect. So far as I have observed none of these statutes have been construed so as to overturn a legitimate time contract for the sale and future delivery of property, and it may well be doubted whether they could be so interpreted without infringing upon that clause of the Federal constitution which prohibits state legislation of such a character as will impair the obligation of contracts.

C. H. W.

Supreme Court of Wisconsin.

THE STATE EX. REL. BURPEE, RESP., v. R. W. BURTON, APP.

While the principal or teacher in charge of a public school is subordinate to the school board or board of education of his district or city, and must enforce rules and regulations adopted by the board for the government of the school, and execute all its lawful orders in that behalf, he does not derive all his power and authority in the school and over his pupils from the affirmative action of the board. He stands *in loco parentis* to his pupils, and because of that relation he has authority, where the board has remained silent, to enforce obedience to his lawful commands, subordination, civil deportment, respect for the rights of other pupils and fidelity to duty, which are obligations inherent in any proper school system, and constitute the common law of the school, which every pupil is presumed to know and is subject to, whether it has or has not been re-enacted by the district board in the form of written rules and regulations.

The teacher has, therefore, in a proper case, the inherent power to suspend a pupil from the privileges of his school, unless he has been deprived of the power by the affirmative action of the proper board.

The decisions of the department of public instruction on questions within its jurisdiction are entitled to great weight, and should never be overruled by the courts, unless clearly contrary to law.

As to whether a writ of *mandamus* can issue in any case to the teacher in charge of a public school to compel him to reinstate a suspended pupil, *quære*.

APPEAL from Circuit Court of Rock county. On mandamus.

The relator is a resident of the city of Janesville, and the defendant is the principal in charge of the High School in that city.

The relator presented his affidavit to the Circuit Court, in which he charged, in substance, that on the 13th of December 1877, the defendant, without lawful authority or right, and without legal or reasonable excuse, and contrary to the known wishes of the relator, suspended and expelled from said school the relator's son George, aged about sixteen years, who had theretofore been a pupil therein; that the defendant has refused and still does refuse to admit the said George as a pupil in the school.

To the writ the defendant made return, in which he set forth that he suspended George from the privileges of the school for continued misconduct, persisted in by him after patient, kind and friendly advice by his teachers to abstain therefrom, to the injury and demoralization of his class and other pupils in the school. The return contained numerous specifications of disobedient and disorderly conduct, unnecessary to state in detail. It then proceeded to set forth—

"That his suspension from the privileges of the said High School was reported to the Board of Education, which approved, ratified, and sanctioned the same, and ordered said suspension continued.

"That on the same day of said suspension, this defendant did also give immediate notice of such suspension to Austin E. Burpee, father of the said suspended pupil, specifying the name of the suspended pupil, the character and date of the offences for which he was suspended, the date of suspension, and other relevant information in relation to such suspension." * * * *

"And this defendant avers, upon information and belief, that when the said George L. Burpee manifests and expresses regret for his aforesaid misconduct and behavior as a pupil of said High School, and makes a sincere promise of future good conduct, and by complying with the reasonable rules adopted by said Board of Education, he can be re-admitted as a pupil in said High School; and this defendant, as teacher and superintendent of the same, will on such terms be glad to have him re-admitted as a pupil in said High School."

The relator demurred to the return for insufficiency is not stating facts sufficient to show that the relator is not entitled to the peremptory writ prayed for.

Also, that said return is defective and insufficient in not setting forth the rules therein referred to, and in not stating the time when said rules were violated, and how and wherein violated, and also in not stating that said several rules were and each was known to said George L. Burpee, before the alleged violation of the same. Also, that it does not appear by said return or answer that the expulsion of said Burpee was at all necessary to the good order and government of said school.

The court sustained the demurrer and ordered a peremptory mandamus to issue. The defendant thereupon appealed to this court.

Bennett & Sale, for appellant.

Winans & McElroy, for appellee.

The opinion of the court was delivered by
LYON, J.—The power of the Board of Education to suspend a

pupil from the privileges of the school under its charge, and even to expel him, for persistent misconduct, is freely conceded by the learned counsel for the relator. That the acts of misconduct charged against the relator's son in the defendant's return to the alternative writ of mandamus, furnished sufficient grounds for suspending him, we cannot doubt. And moreover, if he was lawfully suspended, no sufficient grounds for restoration are stated in the affidavit for the writ. Indeed the return shows affirmatively that he has not placed himself in a position to entitle him to restoration.

On the argument of the appeal, counsel informed us that the learned circuit judge held that the defendant has no power to suspend a pupil for any cause, such power being vested by law exclusively in the Board of Education, and that the demurrer to the return was sustained on that ground.

Whether the defendant has such power of suspension, and if so, whether it was properly exercised in the present case, are the controlling questions to be determined on this appeal.

While the principal or teacher in charge of a public school is subordinate to the school board or board of education of his district or city, and must enforce rules and regulations adopted by the board for the government of the school, and execute all its lawful orders in that behalf, he does not derive all his power and authority in the school and over his pupils from the affirmative action of the board. He stands for the time being *in loco parentis* to his pupils, and because of that relation he must necessarily exercise authority over them in many things concerning which the board may have remained silent. In the school, as in the family, there exists on the part of the pupils the obligations of obedience to lawful commands, subordination, civil deportment, respect for the rights of other pupils and fidelity to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school. Every pupil is presumed to know this law and is subject to it, whether it has or has not been re-enacted by the district board in the form of written rules and regulations. Indeed it would seem impossible to frame rules which would cover all cases of insubordination and all acts of vicious tendency which the teacher is liable to encounter daily and hourly.

The teacher is responsible for the discipline of his school, and for the progress, conduct and deportment of his pupils. It is his imperative duty to maintain good order and to require of his pupils

a faithful performance of their duties. If he fails to do so he is unfit for his position. To enable him to discharge these duties effectually, he must necessarily have the power to enforce prompt obedience to his lawful commands. For this reason the law gives him the power, in proper cases, to inflict corporal punishment upon refractory pupils. But there are cases of misconduct for which such punishment is an inadequate remedy. If the offender is incorrigible, suspension or expulsion is the only adequate remedy. In general, no doubt, the teacher should report a case of that kind to the proper board for its action in the first instance, if no delay will necessarily result from that course prejudicial to the best interests of the school. But the conduct of the recusant pupil may be such that his presence in the school for a day or an hour may be disastrous to the discipline of the school, and even to the morals of the other pupils. In such a case it seems absolutely essential to the welfare of the school that the teacher should have the power to suspend the offender at once from the privileges of the school; and he must necessarily decide for himself whether the case requires that remedy. If he suspends the pupil, he should promptly report his action and his reasons therefor, to the proper board. It will seldom be necessary for the teacher in charge of a district school to exercise this power, because usually he can communicate readily with the district board, and obtain the direction and order of the board in the matter. But where the government of a public school is vested in a board of education (as in the present case), with a more numerous membership than district boards, and which hold stated meetings for the transaction of business, the facilities for speedy communication with the board may be greatly decreased, and more time must usually elapse before the board can act upon a complaint of the teacher. In those schools the occasions which require the action of the teacher in the first instance will occur more frequently than in the district schools. We conclude, therefore, that the teacher has, in a proper case, the inherent power to suspend a pupil from the privileges of his school, unless he has been deprived of the power by the affirmative action of the proper board.

In the present case we think that the acts of misconduct alleged against the relator's son in the return to the alternative writ, were of a character which justified the defendant in suspending him temporarily, without the previous order of the board of education.

Although, for the purposes of this appeal, the specifications of misconduct contained in the return are admitted by the demurrer, we abstain from setting them out here because it might be unjust to the relator and his son to spread those specifications upon our records before there has been an opportunity to controvert them.

It is believed that the conclusions we have reached in this case are in accord with the uniform rulings of the department of public instruction on kindred questions. The decisions by that department of questions within its jurisdiction are entitled to great weight, and should never be overruled by the courts unless clearly contrary to law.

Certain special grounds of demurrer are assigned, but we do not deem it necessary to pass upon them. If any of them are well assigned leave should have been given to amend the return in the particulars wherein it is defective. Such leave would have been given, doubtless, had the ruling of the Circuit Court been based upon the special grounds assigned.

It follows from the foregoing views that the Circuit Court erred in sustaining the demurrer to the return.

We have grave doubts whether the writ of mandamus can issue in any case to the teacher in charge of a public school to compel him to reinstate a suspended pupil, but have concluded to leave that question undetermined on this appeal. We, however, suggest to counsel for the relator, the questions whether, in case the averment in the return is true that the board of education has ratified and confirmed the act complained of, the whole matter has not passed beyond the control of the defendant; and whether the writ can now go to any person or body other than the board.

We may be permitted to add, in conclusion, that our system of public schools necessarily involves the most delicate relations between parents and children on one side, and the school authorities on the other, and controversies must frequently arise growing out of the enforcement of school discipline. These controversies, relating as they usually do to the control, management and correction of pupils, are apt to have their origin in wounded parental feelings, and are frequently prosecuted with much bitterness. It is cause for congratulation that so few of these controversies appear in the courts. Most of them are determined by the superintendent of public instruction, whose decisions are almost invariably acquiesced in. This result is due to the ability and good judgment of the gentle-

men who have severally filled that high office for a long series of years, aided as we doubt not many of them have been, by the valuable counsels of the present learned and able assistant superintendent, who has long served in that position greatly to the benefit of the state. We regret that this unfortunate controversy could not have been adjusted in the same manner.

The order of the Circuit Court is reversed and the cause remanded for further proceedings according to law.

The number of cases touching upon the powers and duties of school teachers as respects the correction and restraint of the pupils under their charge, is, considering the great importance of the interests involved, surprisingly small. The English authorities, especially, are very few; and all the American cases to be found in the various series of reports, it is believed will be found cited in this note.

The authority of the teacher with respect to the correction of his pupils is analogous to that which belongs to parents, and is regarded as a delegation of at least a portion of the parental authority, and the presumptions are in favor of the correctness of his action: *State v. Pendergrass*, 2 Dev. & Bat. 365; *Lander v. Seaver*, 32 Vt. 114; *Commonwealth v. Seed*, 5 Pa. Law Jour. Rep. 78; *Anderson v. The State*, 3 Head 455. See, also, *Hatheway v. Rice*, 19 Vt. 102, 108.

The old authorities and some modern ones seem to place the authority of a school teacher over the pupil, while it exists, upon precisely the same footing as that of a parent over his child: *Fitzgerald v. Northcote*, 4 Fost. & Fin. 656, 663, note, and cases cited, and 689, per COCKBURN, C. J. The old authorities will be found cited in the note on page 663. This has, however, been questioned. Blackstone says: "The master is *in loco parentis*, and has such a portion of the powers of the parent committed to his charge, viz.: that of restraint and correction, as may be ne-

cessary to answer the purposes for which he is employed:" 1 Bl. Com. 453. See also Chitty's note. And in *Lander v. Seaver*, *supra*, the court approve the above rule, and very reasonably say: "The parent, unquestionably, is answerable only for malice or wicked motives, or an evil heart in punishing his child. This great, and to some extent, irresponsible power of control and correction, is invested in the parent by nature and necessity. It springs from the natural relation of parent and child. It is felt rather as a duty than a power. * * * This parental power is little liable to abuse, for it is continually restrained by natural affection, the tenderness which the parent feels for his offspring, an affection ever on the alert, and acting rather by instinct than reasoning. The schoolmaster has no such natural restraint. Hence he may not safely be trusted with all a parent's authority, for he does not act from the instinct of parental affection. He should be guided and restrained by judgment and wise discretion, and hence is responsible for their reasonable exercise."

This principle is further illustrated by the cases of *Morrow v. Wood*, 13 Am. Law Reg. (N. S.) 692; s. c. 35 Wis. 59, and *Rulison v. Post*, 79 Ill. 567. In *Morrow v. Wood*, a father had directed his child, in attendance upon a public school, to pursue only certain studies, selected by the father from those required or permitted by law to be taught in such school, and actually taught therein, and had forbidden the child to

pursue a certain other study, and this fact was known to the teacher of the school. It was held that such teacher was not authorized to inflict corporal punishment upon the child for the purpose of compelling it to pursue the study so forbidden by the father. Neither has the teacher, under the orders of the directors, power to expel a pupil from the school under such circumstances for declining to pursue a certain study forbidden by the parent: *Rulison v. Post, supra*. See also, *Dritt v. Snodgrass*, 66 Mo. 286.

The authorities all concede the power of the teacher, under proper circumstances, to inflict a reasonable corporal punishment upon the pupil. This rule of law has, however, been criticised, and the tendency is to restrict rather than enlarge the authority of the teacher in this respect. In *Cooper v. McJunkin*, 4 Ind. 290 (1853), STUART, J., uses the following language: "The law still tolerates corporal punishment in the school-room. The authorities are all that way, and the legislature has not thought proper to interfere. The public seems to cling to a despotism in the government of schools which has been discarded everywhere else. Whether such training be congenial to our institutions and favorable to the full development of the future man, is worthy of serious consideration, though not for us to decide."

In that case, the reasonable rule was laid down, that a teacher in the exercise of the power of corporal punishment, must not make such power a pretext for cruelty and oppression; but the cause must be sufficient, the instrument suitable, and the manner and extent of the correction, the part of the person to which it is applied, and the temper in which it is inflicted, should be distinguished with the kindness, prudence, and propriety which becomes the station. See also *Quinn v. Nolan*, 4 Cin. Law Bull. 81.

In *State v. Pendergrass*, 2 Dev. & Bat. 365, the rule, as to the extent of punishment, is laid down as follows:—

"The welfare of the child is the main purpose for which pain is permitted to be inflicted. Any punishment therefore, which may seriously endanger life, limbs or health, or shall disfigure the child, or cause any other permanent injury, may be pronounced in itself immoderate, as not only being unnecessary for, but inconsistent with, the purpose for which correction is authorized. But any correction, however severe, which produces temporary pain only, and no permanent ill, can not be so pronounced, since it may have been necessary for the reformation of the child, and does not injuriously affect its future welfare." * * * "When the correction administered is not in itself immoderate, and not, therefore, beyond the authority of the teacher, its legality or illegality must depend entirely on the *quo animo* with which it was administered. Within the sphere of his authority the master is the judge when correction is required, and of the degree of correction necessary; and like all others imparted with a discretion, he cannot be made penally responsible for error of judgment, but only for wickedness of purpose." See also *Commonwealth v. Seed*, 5 Pa. Law Jour. Rep. 78.

In *Commonwealth v. Randall*, 4 Gray 36, however, where, on the trial of an indictment of a schoolmaster for an assault on a pupil, the judge refused to instruct the jury that the defendant was criminally liable for punishing a pupil, only when he acted *malò animo*, from vindictive feeling, passion or ill-will, or inflicted more punishment than was necessary to subdue the pupil and secure obedience, and not for errors of opinion or mistakes of judgment merely, provided he was governed by an honest purpose to promote the discipline and highest welfare of the school and the best interests of the pupil; and in-

structed them that in inflicting corporal punishment a teacher must exercise reasonable judgment and discretion, and be governed as to the mode and severity of the punishment by the nature of the offence, the age, size, and apparent power of endurance of the pupil, and left it to the jury to decide whether under all the facts the punishment was excessive, it was held that the defendant had no ground of exception. In *Lander v. Seaver*, 32 Vt. 114, substantially the same conclusion was arrived at, with the qualification that if there is any reasonable doubt whether the punishment was excessive, the master should have the benefit of the doubt.

Admitting, then, the right of the teacher to chastise the pupil moderately, whenever the correction, as confessed by the pleadings, or as proved on trial, appears to have been clearly excessive and cruel, it must be adjudged illegal: *Burlington v. Essex*, 19 Vt. 102, 108; *Cooper v. McJunkin*, 4 Ind. 290; *Lander v. Seaver*, 32 Vt. 114; *Anderson v. The State*, 3 Head 455.

As respects the limits of the jurisdiction over the pupil as to time and place, in *Lander v. Seaver*, 32 Vt. 114, it is said to be conceded that the right to punish extends to school hours, and that there seems to be no reasonable doubt that the supervision and control of the master over the pupil extends from the time he leaves home to go to school till he returns home from school. In the same case it was also held that, although a schoolmaster has in general no right to punish a pupil for misconduct committed after the dismissal of school for the day and the return of the pupil to his home, yet he may, on the pupil's return to school, punish him for any misbehavior, though committed out of school, which has a direct and immediate tendency to injure the school and subvert the master's authority. See, however, *Murphy v. Board of Directors*, 30 Iowa 429, where, however,

the decision was based upon a statute authorizing the directors to dismiss any pupils from school *for gross immorality, or for persistent violation of the regulations of the school.*

Where, however, under a statute authorizing the board of directors to make and enforce all needful rules and regulations for the government, management, and control of schools, as they should think proper, not inconsistent with the laws of the land, a board of directors made a rule that no pupil should, during the school term, attend a social party, and the plaintiff, a pupil of the school, by permission of his parents, violated the rule and was expelled from the school for so doing; in an action against the directors to recover damages for the expulsion, it was held, that under the law they had power to make needful rules for the government of pupils while at school, but no power to follow them home and govern their conduct while under the parental eye; and that in prescribing such rule they had exceeded their power and had invaded the rights of the parents: *Dritt v. Snodgrass*, 66 Mo. 286.

As respects the age of the pupil, if a person, who has attained his majority, voluntarily attends school, creating the relation of teacher and pupil, he thereby waives any privilege which his age confers, subjects himself to like discipline with those who are within the school age, and may be punished for refractory conduct. And the teacher in such case will escape liability therefor upon proof that the chastisement was under all the circumstances reasonable: *The State v. Mizner*, 45 Iowa 248; *Stevens v. Fassett*, 27 Me. 266, 287.

The master of a school may also impose reasonable restraint upon the persons of his pupils, either by way of prevention or punishment of disorderly conduct: *Fitzgerald v. Northcote*, 4 Fost. & Fin. 656, per COCKBURN, C. J.; 1 Bl. Com. 453; Cooley on Torts 171.

The power of teachers and school directors, or other officers having the supervision and control of schools, to make rules and regulations for the government of the schools, has been referred to in some of the cases already cited. Where their authority is not expressly defined by statute it may be said in general terms that such rules and regulations must be reasonable. The teacher has not, as it seems, a discretionary power of expulsion, but only for reasonable cause: *Fitzgerald v. Northcote*, 4 Fost. & Finlayson 656, 685, per COCKBURN, C. J.

In Massachusetts it is held that the school committee of a town have power to pass all reasonable rules and regulations for the government, discipline, and management of the public schools under their general charge and superintendence: *Roberts v. Boston*, 5 Cush. 198; *Sherman v. Charleston*, 8 Id. 160; *Spiller v. Woburn*, 12 Allen 127; *Hodgkins v. Rockport*, 105 Mass. 475.

A school committee has, in Massachusetts, authority, not subject to revision, if exercised in good faith, to exclude a pupil from a public school for misconduct which injures its discipline and management, such conduct not being mutinous or gross, or consisting of a refusal to obey the commands of the teachers, or of any outrageous proceeding, but of acts of neglect, carelessness of posture in his seat and recitation, tricks of playfulness, and inattention to study and the regulations of the school in minor matters: *Hodgkins v. Rockport*, 105 Mass. 475; see also *Fitzgerald v. Northcote*, 4 Fost. & Fin. 656, 687.

The general school committee of a city or town have power, under the laws of Massachusetts, in order to maintain the purity and discipline of the public schools, to exclude therefrom a child whom they deem to be of a licentious and immoral character, although such character is not manifested by any acts

of licentiousness or immorality within the school: *Sherman v. Inhabitants of Charleston*, 8 Cush. 160.

The school committee of a town may, it is held, lawfully pass an order that the schools thereof shall be opened each morning with reading from the Bible and prayer, and that during the prayer each pupil shall bow the head, unless his parents request that he shall be excused from doing so; and may lawfully exclude from the school a pupil who refuses to comply with such order, and whose parents refuse to request that he shall be excused from doing so: *Spiller v. Inhabitants of Woburn*, 12 Allen 127. See also *Donahoe v. Richards*, 38 Me. 376. As to the exclusion of the Bible from the schools, see Cooley on Torts 289; *Board of Education v. Minor*, 23 Ohio St. 211.

School directors have in Illinois no power to expel a pupil for any reason except disobedient, refractory or incorrigibly bad conduct, and for these only after all other means have failed: *Rulison v. Post*, 79 Ill. 567. And all rules and regulations adopted by school directors must be reasonable and calculated to promote the object of the law—the conferring upon all, free of charge, such an education as they are by law entitled to receive: *Rulison v. Post*, *supra*.

Under a statute authorizing the making of reasonable and proper rules for the government of schools, a rule providing that pupils may be suspended from school in case they shall be absent or tardy, except for sickness or other unavoidable cause, a certain number of times, is a reasonable and proper rule for the government of a school: *Burdick v. Babcock*, 31 Iowa 562.

The prudential committee of a school district may, it has been held in Vermont, exclude children from further attendance upon a term of school, for absence contrary to the rules thereof, though such absence be pursuant to the

command of their Roman Catholic parents, and by direction of their priest, for the purpose of attending religious services on *Corpus Christi* day : *Ferriter v. Tyler*, 15 Am. Law Reg. N. S. 570 ; s. c. 48 Vt. 444.

A requirement by the teacher of a district that the pupils in grammar schools shall write English compositions, is a reasonable one ; and if such a pupil, in the absence of any request from his parents that he may be excused from so doing, refuse to comply with such a requirement, he may be expelled from school on that account : *Guernsey v. Pitkin*, 32 Vt. 224.

So, where one of the rules adopted by the board of education provided that if any pupil should fail to be prepared with a rhetorical exercise at the time appointed therefor, he or she should, unless excused on account of sickness or other reasonable cause, be immediately suspended from the department, the rule was held reasonable, and neither the teacher of the department nor the board of education were liable in damages for the suspension of a pupil for a failure to comply with the rule or to offer any excuse therefor : *Sewell v. Board of Education*, 29 Ohio St. 89.

Whether an action will lie against a teacher for refusing to instruct those who lawfully come to him for instruction, or whether the remedy is confined to an appeal to the governing board, Judge COOLEY says, in his work on Torts, p. 288, is left in doubt on the authorities, though he expresses the reasonable opinion that such refusal is actionable. The parent of a child expelled from a public school by order of the superintending school committee, can, it is held, maintain no action against them for such expulsion : *Donahoe v. Richards*, 38 Me. 376 ; *Stephenson v. Hall*, 14 Barb. 222. So, in *Spear v. Cummings*, 23 Pick. 224, it was held that

the teacher of a town school was not liable to an action by a parent for refusing to instruct his children. See, also, *Learock v. Putnam*, 111 Mass. 499. If an action can be maintained in such case, it should be in the name of the child and for his benefit : *Stephenson v. Hall*, *supra*. See, however, *contra*, *Roe v. Denning*, 21 Ohio St. 666, where an action for a wrongful expulsion of the child was held to lie in favor of the parent against both the teacher and the local directors. The rule in Massachusetts has also been changed by statute : Stat. 1845, c. 214. See, also, as to action by pupil for expelling him from school : *Dritt v. Snodgrass*, 66 Mo. 286.

As to the right of placing colored pupils in different schools, see the cases collected in Cooley on Torts 287, 288.

As to the right of the state over children in respect to reform and industrial schools, see *People ex rel. O'Connell v. Turner*, 10 Am. Law Reg. (N. S.) 366, and note ; s. c. 55 Ill. 280 ; *Milwaukee Industrial School v. Supervisors*, 40 Wis. 328 ; *Prescott v. State*, 19 Ohio St. 184 ; Cooley's Const. Lim. *299.

The principal case seems to be the first in which the particular point decided (*viz.*, whether, in a proper case and where not deprived of the power by affirmative action of the proper board or by statute, the teacher can suspend a pupil from the privileges of the school), has ever been passed upon. At least no case has been found passing upon it. The power to expel for a reasonable cause was hinted at in *Fitzgerald v. Northcote*, but the question of expulsion was not necessary to the decision of the case. The rule laid down in the principal case seems, however, so eminently reasonable and proper, that we cannot doubt that it will establish the law upon this point.

MARSHALL D. EWELL.

Supreme Court of Errors of Connecticut.

THE STATE v. SARGENT ET AL.

The owners of land bounded on a harbor own only to high-water mark. They have a right to construct wharves upon the soil below that line, if they conform to such regulations as the state shall see fit to prescribe, and do not obstruct navigation.

The duty of protecting the paramount right of navigation rests upon the legislature, and they are to determine for themselves by what methods and instrumentalities they will discharge it.

They have power to vest in commissioners appointed by themselves, authority to restrain riparian proprietors from extending structures into navigable waters.

The enactment of such a law is in no sense an exercise of the right of eminent domain. The public do not appropriate or use any right of the landowner in the soil of the shore.

The Act of 1872, establishing a board of commissioners for New Haven harbor, to be appointed by the governor, with the advice of the senate, in one section gives the board power to prevent and remove encroachments upon the waters of the harbor; in another section authorizes them to prescribe harbor lines beyond which no structure should be extended, giving notice to all persons interested to appear and be heard, and making a report to the General Assembly, and in another section makes any structure within the tide-waters of the harbor not approved by the commissioners a public nuisance, and authorizes the commissioners to bring suits in the name of the state to stop any such erection. *Held*,

1. That the act was constitutional and valid.
2. That it was not necessary for the commissioners to establish a general harbor line before forbidding or removing any particular encroachments.

The act was passed in 1872. By the revision of 1875 it was provided that all public laws not contained in the revision, except acts which though public in form were of a private nature, and some others, were thereby repealed. This act was not contained in the revision. By an established custom the acts of each year were published by the secretary of state in two pamphlets, one called "Public Acts" and the other "Private Acts and Resolutions." This act was published among the private acts for the year 1872. *Held*, that it was to be presumed that the legislature acted with reference to this usage and to the classification made by the secretary in this instance, and intended to preserve the act in question under the description of acts which though public in form were of a private nature.

ON motion for injunction.

The General Assembly in 1872 passed an act by which the governor was authorized and directed to appoint a Board of Harbor Commissioners for New Haven harbor. The material parts of the act, so far as this case is concerned, are as follows:

Sec. 2. Said Board of Harbor Commissioners shall have the general care and supervision of New Haven harbor and its tide waters, and of all the flats and lands flowed thereby, in order to prevent and remove unauthorized encroachments and causes of every kind which are liable to interfere with the

full navigation of said harbor, or in any way injure its channels, or cause any reduction of its tide waters. * * *

Sec. 3. Whenever, in the judgment of said Board of Harbor Commissioners, the public good requires, they may proceed to prescribe harbor lines in said harbor, beyond which no wharf, pier, or other structure shall be extended into said harbor, and shall report the same for the consideration of the General Assembly at its next session. *Provided, however,* that said commissioners before drawing any such line, shall appoint a convenient time and place for hearing all persons interested, &c.

Sec. 4. All persons contemplating the building over said harbor and tide waters any bridge, wharf, pier, or dam, or the filling any flats, or driving any piles below high-water mark, shall, before beginning it, give written notice to said commissioners of the work they intend to do, and submit plans of any proposed wharf or other structure, and of the flats to be filled, and of the mode in which the work is to be performed; and no such work shall be commenced until the plan and mode of performing the same shall be approved in writing by a majority of said commissioners, and said commissioners shall have power to alter said plans at their discretion, and to prescribe the direction, limits and mode of building the wharves and other structures, and all such works shall be executed under the supervision of said commissioners.

Sec. 6. Any erection or work hereafter made in any manner not sanctioned by said commissioners, where their direction is required as hereinbefore provided, within tide waters flowing into or through said harbor, shall be deemed, and is hereby declared to be, a public nuisance. Said commissioners shall have power to order suits in the name of the state to prevent or stop by injunction or otherwise, any such erection or other nuisance in the tide waters flowing into or through said harbor, &c.

In June 1877, the respondents, being riparian proprietors upon New Haven harbor, exhibited to the commissioners appointed under said act a plan of a wharf which they proposed to extend from their shore line into the harbor. The commissioners disapproved of the plan and refused them permission to build as proposed. They began to execute the work without such permission and were enjoined by the Superior Court upon the motion of the commissioners. That court then asked the advice of this court as to what decree should be passed upon a motion to make the injunction perpetual.

The opinion of the court was delivered by

PARDEE, J.—By the common law as it stood long before the coming of our ancestors to this country and the settlement of the colony at New Haven, the king, as *parens patriæ*, held the title to the soil under the sea between high and low-water mark; he held it not for his own benefit but for his subjects at large, and for the subjects of all states at peace with him; he held it in trust, for public uses, established by ancient custom or regulated by law, the

most important of which are those of fishing and navigation. In 1662 Charles II. granted all the lands of the colony by charter to the freemen incorporated thereby. This court said, in *Church v. Meeker*, 34 Conn. 421, that there had been in this state no judicial determination of the question whether or not that charter conveyed the royal title to the shores of the sea; that the Supreme Courts of Massachusetts, New Jersey and the United States, having each decided that similar grants did, under the head of "royalties," convey such title, this court would follow them and declare that the title to the "shores of the sea" rested in the freemen of the colony before the king was excluded by the revolution and independence; and that they, through their legislature, may therefore now exercise all the powers which previous to the grant could have been exercised either by the king alone or by him in conjunction with his parliament, subject only to those restrictions which have been imposed by the constitution of this state or of the United States.

The respondents as owners of land bounded on a harbor, own only to high-water mark. It is true they have a right to construct wharves upon the soil below that line if they conform to such regulations as the state shall see fit to impose upon them, and do not obstruct the paramount right of navigation. From their land bounding upon the shore they hold the exclusive right to embark and go upon the sea, for the reason that no other person can enter upon their land for embarkation or for any other purpose, without their permission; but every person has the superior right to navigate the waters opposite thereto without obstruction from any structure erected by them.

The duty of protecting this dominant right rests upon the legislature; and they are to determine for themselves by what methods and instrumentalities they will discharge it. It is plain that they themselves cannot descend to the making of frequent examinations into the situation of each riparian proprietor upon our extended coast. There is no bar in reason, and none in the constitution, to the vesting in commissioners appointed by themselves the power to restrain such proprietors from extending structures into navigable waters; they part with no legislative power; they enact the law; the commissioners, by the aid of the courts, enforce it. Besides, this mode of performing the service which the legislature owes to the commerce of the world, has so often received both legislative and judi-

cial sanction in other jurisdictions that it is now quite too late to challenge it.

The enactment of the law is in no sense an exercise of the right of eminent domain; it is not that taking of private property for public use for which compensation is to be made. The public do not propose in any manner to appropriate or use any right of the respondents in the soil of the shore, but only to guard against any invasion by them of the paramount right of the public to navigate the waters over it; to enforce against them the maxim *sic utere tuo ut alienum non lædas*. It is only the exercise of the police or supervisory power vested in the legislature; the power to enact such laws as they deem reasonable and necessary for the regulation of the use by riparian proprietors of their qualified right to the soil of the shore. Indeed, no individual is the absolute owner of any land in so high a sense as that he can set the legislature at defiance as to the use he may make of it; as part of the price to be paid for the privilege of living under law he subjects himself to certain restrictions for the public good; to limitations upon the profitable use of his property for the promotion of the general welfare. The prohibitions against wooden buildings, powder magazines and slaughter-houses in cities are common instances of this.

The shore line is singular, broken by alternate indentations and projections, and the deep-water channel is at every possible angle with, and at varying distances from it. The unrestrained desire of proprietors to build first and farthest leads them to invade and obstruct the channel. Hence the occasion for legislative interference for the preservation of the acknowledged right of all vessels to access to all wharves. Neither in its provisions nor in its mode of execution is the act in violation of any of the fundamental principles of the social compact; on the contrary its effect is greatly for the wealth and peace of the public. The manner of its enforcement is open and fair. The respondents first advised the commissioners specifically of their plans; this opened the door for a hearing; after hearing and consideration the latter advised them that the proposed structure would obstruct the public right of navigation. Here was a day in court; a day before a tribunal presumably impartial and specially qualified to determine the precise matter intrusted to them.

Nor does the law become partial and individual in its scope and operation, for the reason that the commissioners are clothed with

power to limit the extent to which any proprietor may reach out from his shore line towards or into navigable waters, and that it therefore will result that A., B. and C. will be permitted to build wharves of different lengths. The location of the land of each, the configuration of his shore-line, the relative position of the channel, and the outline of the whole harbor, as it bears upon his particular case, and all to be taken into consideration and weighed by the commissioners; they are to determine the largest measure of use of his right to the shore which each can enjoy consistently with the greatest benefit to the public. And this general rule is to be applied alike to the respondents and all other owners; each is to surrender precisely what is necessary to prevent his wharf from being an obstruction. Therefore, so far as the law and the reason of its being are concerned, the surrender by each is precisely the same.

We are to take notice that the wharves in New Haven harbor have now become numerous and valuable; that the effort to extend them has invited public attention and legislative interference; that the act in question is an exception to the ordinary rule by which laws operate only after the adjournment of the legislature enacting them, and is made to take effect upon its passage. From these facts we are to infer that, so far forth as its protecting power is concerned, it was intended for immediate effect; and this is the interpretation to be put upon it. We regard the establishment of a harbor line as a matter quite apart from the duty of the commissioners to take the harbor at once into their keeping. The existence of such a line spanning the whole harbor is not at all necessary to the exercise of their restraining power over a structure immediately to be built.

The high-and low-water lines, and the course of the channel being known, they have all necessary data for action in reference to each case as it arises.

But if in their opinion the public right of navigation could be more perfectly protected, and the conflicting claims of proprietors more satisfactorily adjusted by the immediate establishment of a line for the whole harbor, in advance of any intention to build wharves, they are authorized to advise the legislature as to the course which in their judgment such a line should follow; but it is obvious that its highest usefulness could only be secured by the immediate exercise of the power to hold all proprietors in check

until there is opportunity for legislative action. So far as the erection of any proposed wharf is concerned, they must act at once, so far as this general line is concerned they may act at once or never.

By section 1, title 22, page 551, of the Revision of 1875, it is enacted as follows: "all public laws, not contained in the foregoing titles, except acts of incorporation, confirming acts, acts which though public in form are of a private nature, and all public laws except such as by particular provision and this title are continued in force, are repealed."

The respondents urge that the act in question is public, both in form and nature, and therefore is not saved by any of the foregoing exceptions.

After the close of each session of the legislature the secretary of the state has given notice to the public of the acts passed by publishing a part of them in one pamphlet as "public acts;" and a part in another pamphlet as "private acts and resolutions." The act before us, passed in 1872, was published in the pamphlet of private acts and resolutions for that year. This classification, it is true, was that of the secretary and not of the legislature; but there the public found it, and overlooking the distinctions between public in form but of a private nature, and acts public in form but of a special nature, came to regard and speak of this as private; and presumably the legislature of 1875, the members of which were of this public, intended to include it in, and save it under the description of "acts which though public in form are of a private nature." Indeed the same legislature, in section 19, page 438, of the Revision of 1875, provided that "the private or special acts of this state shall be legal evidence, and the courts shall take judicial notice of them;" seeming to use the terms "private" and "special" as having the same general signification.

The legislature of 1869 had passed an act entitled "An act to prevent and remove nuisances and obstructions from the channel of Mill River." This channel is a part of the harbor of New Haven, and the act is essentially of the same nature as the one in question; but the same secretary saw fit to publish it in the pamphlet of public acts for that year, and there the public found it, and still disregarding distinctions, had come to regard this as a public act. But the legislature of 1875, declares that though public in form it is either local or private in its nature, and in the

sixth section, protects it by special mention from any asseveration even that the general words, "all public laws," in the first section had repealed it. The act in question, that of 1872, never having been printed with the public acts, and always having been regarded as private in nature, stood in no need of such mention for its protection. The legislature recognising the fact that the general understanding as to what laws are public and what are private, is mainly the result of the official declarations made by the secretary from year to year, adapted certain expressions both in the first and in the sixth sections to this popular idea.

We think that the act in question has not been repealed.

We advise the Superior Court to grant the injunction.

Supreme Court of Indiana.

SAMUEL C. TAYLOR, ADM., v. J. H. FICKAS.

The owner of land on which there is a watercourse has a right to receive the water in its natural channel, and to use it while passing over his land, but he is required to return it to its channel when it leaves his land.

The owner of land is the absolute owner of all water that lies on the surface of it from rain-fall or the overflow of contiguous streams. And as such owner, he may fill up his land so as to prevent its being so overflowed.

An owner of land which was liable to be overflowed at certain times of the year by the rise of the Ohio river, planted a thick row of trees along the boundary between his land and that next adjoining. The effect of this was to arrest the drift-wood, and in times of overflow to back up the water on the adjoining land : *Held*, that the adjoining owner had no cause of action.

ERROR to Vanderburg Superior Court.

This was an action by plaintiff as administrator of Martha E. Taylor, who was in her lifetime the owner of a quarter section of land near the Ohio river.

The plaintiff averred in his declaration that during the year 1862, the defendant became the owner and entered into the possession of a strip off of said land, which lies in strips, each half a mile in length, running north and south, and are situated near the Ohio river, and are a part of the overflowed bottom lands lying near said river; that from time immemorial a large extent of the land has been and still is liable to be overflowed with water from said river, after excessive rains in the valley of said river. That during such times the water from said river flows over said tracts of land with a rapid current, the general current running from east

to west, first over lands of decedent and then of defendant. That the water varies from two to ten feet in depth, and that the water (which is in fact a part of said river) has run in that manner during times of overflow from time immemorial; and that the same would have continued to flow but for the wrongful acts of defendant. That during such times drift-wood has floated in said current over the lands in question without injury, and would have continued so to float but for the wrongful acts of defendant.

That said lands were in a state of cultivation and were worth \$100 per acre. That the defendant, to protect his land from drift-wood, in the year 1864, wrongfully and unlawfully planted and has since continued and maintained a row of trees on his said land, on the line dividing said tracts of land, in a continuous row or line for a distance of half a mile, such trees being planted only two feet apart the whole length of said line.

That at the time decedent purchased said land the said trees had but recently been planted, and were of small size, and were not sufficient to form the obstruction hereafter complained of. That said trees have been unlawfully maintained from the year 1867 to the year 1874, having grown to a sufficient size and strength, prevent the drift-wood from floating in said current during times of high-water; and during all these eight years, the drift-wood which would have floated over and away from said decedent's land, and from defendant's land, lodged upon and against the said trees and upon said decedent's land in large quantities, so that a dam has been and was formed against said trees and upon decedent's land, by means whereof a large area of said land, to wit, five acres became covered with said drift-wood, to the depth of from two to ten feet, and which remains covered, by reason whereof the said lands become and were worthless and of no value; by means whereof, the said decedent sustained damages to the amount of \$2000, for which he demands judgment or proper relief, &c., &c.

To this complaint, the appellee demurred, and the demurrer was sustained.

The opinion of the court was delivered by

BIDDLE, J.—If this complaint was brought solely in the right of an administrator the action would not lie. An administrator cannot sue for an injury to the freehold. *Emmerson v. Emmerson*, 1 Vent. 187; *Hill v. Penny*, 17 Me. 409; *Toller on Ex.*, § 159.

By the common law lands went to the heir, not to the administrator: 1 Blackst. 201. In the state of Indiana, the administrator has no right to the lands which descend to the heir, except upon the contingency that the personal estate is insufficient to pay the debts against the deceased, or in the absence of heirs or devisees. 2 R. S. (1876) 519; sec. 75, p. 535, sec. 110. And this is the general American doctrine. The appellant cannot maintain the case as an administrator, but in the body of the complaint he avers that he is the sole heir of the decedent, and that the lands had descended to him. As an heir he may bring this action.

The property in water that passes through a watercourse which has a bed, channel and banks, where it usually flows, is a mere usufruct interest, continuing only while the water is passing over the lands of the owner.

He has the right to receive it where the watercourse in its natural channel enters his land, and to use it while it is passing over his land; but he is required to return it to its channel when it leaves his land: Bouvier's Dict.; Angell on Watercourses, secs. 94, 135.

The property in the lost water that percolates the soil through the surface of the earth in hidden recesses, without a known channel or cause, and property in the wild water that lies upon the surface of the earth or temporarily flows over it, as the natural or artificial elevations or depressions may guide or invite it, but without a channel, and which may be caused by the falling of rains or the melting of snow or ice, or the rising of contiguous streams or rivers, falls within the maxim that a man's land extends to the centre of the earth below the surface, and to the skies above, and is absolute in the owner of the land as being part of the land itself. Angell on Watercourses, sec. 108; *The N. A. & Salem Railroad Co. v. Peterson*, 14 Ind. 112, and *The City of Green-castle*, 23 Id. 186.

In the complaint before us there is no averment of any watercourse, except indeed, by way of parenthesis, that the place during floods is a part of the Ohio river; but the facts averred show clearly that it was not upon the bed of the river, nor within its channel, nor between its banks; in short, that it is no part of a watercourse, but that the flow is over the entire surface of the land, is occasioned by temporary causes, and is not usually there. The rights of the appellee are therefore, such as a proprietor may have in surface-water, which, as we have seen, is a part of his land; and the injuries

or inconveniences which the appellant is alleged to have suffered, are such as arise from the changes, accidents and vicissitudes of natural causes. These rights and liabilities are so well defined by BIGELOW, C. J., in the case of *Gammon v. Hargaden*, 10 Allen 196, that we adopt the definition as our own.

“The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated, with reference to that of adjoining owners, that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling upon its surface or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lots, or pass into or over the same in greater quantities or in other directions than they were accustomed to flow.”

Again, from the same case :

“The obstruction of surface-water, or an alteration in the flow of it, affords no cause of action, in behalf of a person who may suffer loss or detriment therefrom, against one who does no act inconsistent with the due exercise of dominion over his own soil.” See rules in 11 Am. Law Register, by Mr. Justice REDFIELD.

In delivering the opinion in the case of *Goodale v. Tuttle*, 29 N. Y. 459, DENIO, C. J., said : “And in respect to the running off of surface-water caused by rain or snow, I know of no principle which will prevent the owner of land from filling up the wet or marshy places on his own soil for its amelioration and his own advantage because his neighbor's land is incommoded by it. Such a doctrine would militate against the well-settled rule that the owner of land has dominion over the whole space above and below the surface.”

The maxim “that every one must so enjoy his property as not to injure the property of another,” so earnestly insisted upon by the appellee, means no more than that every one must so enjoy his property according to his legal right as not to injure the legal rights of another. It is sometimes impossible for the owner to use his property within his legal right, without in some slight degree, at least, injuring the property of another. Such a case is not within the maxim, provided it does not injure a legal right in the property of another. In the case of *Palmer v. Mulligan*, 3 Caines 307,

THOMPSON, J., properly said; "The elements being for general and public use, and the benefit appropriated to individuals by occupancy, this occupancy must be negotiated and guarded with a view to individual rights of all who have an interest in their enjoyment; and the maxim *sic utere tuum ut alienum non lædas* must be taken and construed with an eye to the natural rights of all; and although some conflict may be produced in such uses and enjoyments, it is not considered in the judgment of the law an impairment of the right. In case of *Chatfield v. Wilson*, 28 Vermont 49, it is said, "The maxim *sic utere*, &c., applies only to cases where the act complained of violates some legal right of the party; and it may be laid down as a position not to be controverted that an act legal in itself violating no right, cannot be made actionable on the ground of the motive which induced it."

It is plain that the facts averred in the complaint we are considering do not fill the law as expressed above.

The doctrine contended for by the appellant applied to the vast alluvial regions—so generally level and subject to occasional inundations—bordering upon the Ohio river, and lying along large rivers and streams of this state, would very much embarrass agriculture and general improvement by preventing proprietors of lands from securing their fences by planting trees, or by other permanent methods, and in some instances perhaps render large portions of our richest soil useless. While the owners of lands may not obstruct watercourses to the injury of others, they must be permitted to fence and cultivate these fields, and improve their lands in the way which best subserves their interests, without being responsible for the accidents of floods or the shifting of surface-water occasioned thereby, although sometimes slight and temporary injuries may result therefrom to adjoining owners. These are accidents which must be borne alike by all.

We think the law has wisely discriminated between the rules which apply to watercourses and those which apply to surface waters. See the following authorities: *Shields v. Arndt*, 3 Greene 234; *Bates v. South*, 100 Mass. 181; *Gooaale v. Tuttle*, 29 N. Y. 459; *Buffum v. Harris*, 5 R. I. 243; *Beard v. Murphy*, 37 Vt. 99; *Sweet v. Cutts*, 50 N. H. 439; *Rawston v. Taylor*, 11 Har. & G. 369; *Hoyt v. City of Hudson*, 27 Wis. 656; *Barnes v. Sabron*, 10 Nev. 217.

The court did not err in sustaining the demurrer to the complaint, and

Judgment is affirmed.

RECENT ENGLISH DECISIONS.

High Court of Justice of England; Queen's Bench Division.

THACKER v. HARDY.

The defendant employed the plaintiff, a stockbroker, to speculate for him on the stock exchange, knowing that for the purpose of carrying out his transactions the plaintiff would have to enter into contracts to buy or sell stocks and shares, and, in order to protect himself and the defendant, would have to enter into other contracts to buy or sell respectively. The plaintiff knew that the defendant never expected or intended to accept actual delivery of the stocks and shares which the plaintiff might buy for him, nor actually to deliver the stocks and shares that the plaintiff might sell for him. The defendant, nevertheless, knew that he incurred the risk of having to accept or deliver; but was content to run that risk in the expectation and hope that the plaintiff would arrange so as to make nothing but "differences" payable to or by him; and unless that arrangement was made the defendant was, to the knowledge of the plaintiff, wholly unable to pay for or deliver the stocks and shares bought or sold.

In an action by the plaintiff against the defendant for commission and indemnity against the liabilities incurred by the plaintiff on the stock exchange, with the authority and for the benefit of the defendant, the defendant pleaded that the claim was founded on gaming and wagering transactions, illegal at common law and under 8 & 9 Vict. c. 109, s. 18. *Held*, that the plaintiff was entitled to recover both the commission and indemnity claimed.

Grizewood v. Blane, 11 C. B. 538, discussed.

THIS was an appeal from a judgment of LINDLEY, J., at a trial without a jury, and raised the question of the right of a stockbroker to recover from his employer, commission and money paid for differences arising in transactions on the stock exchange, in which, to the knowledge of the broker, no actual transfer of stock was intended to be made.

The plaintiff was a stockbroker, and the defendant a gentleman possessed of about 20,000*l.* At the time of the transactions, out of which the present action arose, the defendant shared the plaintiff's offices, and employed his capital in gambling transactions, in which the plaintiff acted for him as broker, employing a jobber in the usual way. The action was for a sum of 18,414*l.* 17*s.* 6*d.*, due from the defendant to the plaintiff, on account of a long series of sales of stocks and shares, and of carrying over and closing various contracts and sales, and for commission on the several transactions. The main defence set up by the defendant was that the contracts in respect of which the plaintiff claimed were made by way of wagering, and were therefore void and illegal.

The judge gave judgment for the plaintiff for the full amount claimed, with costs, whereupon defendant appealed.

Mackenzie, for defendant.

McIntyre, Q. C., and *Payne*, for plaintiff, were not called upon.

BRAMWELL, L. J.—I am of opinion that this judgment must be affirmed. The question is not what was the bargain between the jobber in the house and the defendant (the principal), through the intervention of a broker, but between the broker and the principal. It was admitted that these bargains are what they purport to be, bargains which gave the jobber a right to call upon the broker or principal to take the stock, and the broker a right to call upon the jobber to deliver, there was nothing in the dealing between the jobber and the broker, on behalf of the principal, by which the jobber could tell whether the transaction was one for an investment for the principal or for a speculation; and accordingly, Mr. *Mackenzie* does not rely on the bargain between the broker and the jobber being a gambling or wagering transaction. If the fact had been, as it was supposed erroneously in *Grizewood v. Blane*, (perhaps rightly enough on the evidence as it was understood), the judgment in that case would be quite right, but it was not so; all these bargains between the man in the house and the broker are real bargains, and mean what they say, though, very probably, when the time comes for their fulfilment another bargain may be made in lieu of the original one. Mr. *Mackenzie* admits this, but puts a new matter before us. He says, assuming it to be true that the jobber or dealer in the house could enforce an exact performance of the contracts, yet that the bargain between the plaintiff, who is suing, and who was the broker and not the jobber, and the defendant, was that, "though you, the broker, are to buy for me or sell for me, I am never to pay for the article bought, or take or deliver it and receive or pay the price accordingly, but you are, when the time arrives for my taking or paying the price, or delivering or receiving the article, to make another bargain with some one else or somehow, or in some way arrange so that I shall be enabled to set the one transaction off against the other, and neither have to deliver nor receive actual stock or the price of it."

I am not sure whether that was the bargain between the principal and broker; but most certainly it is not the bargain if you take an isolated case.

If I went to a broker and said, "I wish you would sell for me 10,000 consuls for the next account," and he did so, I clearly am

of opinion that I should have no right to go to him afterwards and say, in the sense of his being bound to do it, "you must rebuy them for me; for he could say, "I am not bound to do so." Whether such an obligation or duty arises on the part of the broker in cases where there has been a continual mode of so transacting business may be more doubtful. If it could be proved that the principal had said, "I cannot take these things in reality, and so you must resell them," and the broker had said, "of course," or if he had used an expression to the effect that he would rather not do it, but had done it, it might be that a jury would find that the understanding between the parties was not that that state of things should go on *ad infinitum*, but that there was at least this arrangement between the broker and the principal, viz.: that every transaction for one account should be disposed of, *quoad* that account, by a transaction in a contrary sense, so that only the difference between the two should be paid. It is possible that one might conclude, under such circumstances, that the principal would have a right to say, "you made bargains for me by which I must deliver; you must undo those bargains by selling, so that I receive; the result will be that you can set off the two transactions, and I shall only have to pay you, or receive from you, the difference." That, however, is subject to this limitation, that the broker might say, "I am not bound to do it; I will try to do it if there is a market."

Whether or not I should come to that conclusion in the present case would require me to have a more minute knowledge of the facts than I have; but I will suppose, in favor of Mr. *Mackenzie* that that was the bargain between the two parties, and that the principal would have a right to say to the broker, "The transaction you entered into is for a purchase, and accordingly I am bound to receive the stock and pay for it; but I call upon you by virtue of the bargain you and I made when I employed you, to sell that stock for me, so that, instead of my taking and paying for it, I shall only have to take or pay the difference." In my opinion there is nothing in that transaction within the Gaming and Wagering Act, for it is quite clear that even in a bargain like that the principal would have a right to say, "I will not go on with these speculations, but I will take the article purchased and hold it as an investment." I have no doubt that that does continually happen, and that men who have bought with the hope of a rise, intending to sell again (not to any enormous extent, but men who have bought

for speculative purposes), have been met with a fall, and have been so disgusted at having to end the matter by reselling or continuing it on and paying continuations or backwardations, as the case might be, that they have under such circumstances found the money and taken the stock and paid for it; and so in that case the transaction comes to this, that the principal has a right to say, "Well, I will take the stock I have bought (if it was a purchase), or deliver the stock I have sold," (if it was a sale); or a right to say, "You must try to end the transaction by buying or selling again." I say "try," for the broker might be unable to do so, and all he would be bound to do would be to endeavor to buy or sell again. What is there illegal in that? I employ you to buy with a right to call on you to sell if it does not suit me to take the article; what gambling or wagering is there between a broker or jobber in that case? Absolutely none. The broker can say it does not matter to me if the thing goes up or down; but in a case of wagering as to the price of stock it does matter to him. In *Grizewood v. Blane*, it mattered to both parties if the thing went up or down, but in the case I put that is not so, and there is no wager or gaming at all. The gamester in heart would be the principal, but the broker would not be wagering or gaming at all.

I am of opinion, therefore, even if everything were found in Mr. *Mackenzie's* favor, which he has suggested should be found, that this case would not be within the Gaming and Wagering Act. I will not, under the circumstances, say anything more about *Grizewood v. Blane*. The difference is that there the question was not between the broker and the principal, but between two principals—a jobber in the house, and a principal out of the house—and the case has no bearing on the present one.

Now, as to time bargains. Mr. Justice LINDLEY has shown what he understood to be a time bargain and an invalid one. A time bargain, merely because it is one, is not invalid. If a man were to undertake to sell me a crop of apples for next year, that is not invalid. But when, by a time bargain, you understand something different in reality from what it purports to be, and that, whereas it purports to be an agreement to deliver and sell an article on a particular day, it is really no such agreement, but is an agreement to pay what shall be the difference between the price when the bargain was made and the price at the future time they name; such

an arrangement is something in the nature of a wager or gaming on the question of what would be the price.

On these grounds I am of opinion that this judgment must be affirmed.

It may be a shocking thing that there should be gaming on the stock exchange, but that is not the question we have to consider: and I am not sure that some place where people could speculate, and buy and sell, not with a view so much to making an investment as to making a profit, is not for the public benefit, for it is a certainty that by it markets can be found for persons who are so minded, and I believe that we are indebted to it for a great many of the railways and useful undertakings that we now have.

Appeal dismissed.

BRETT and COTTON, L.JJ., delivered concurring opinions.

¹ Ever since the days of *Hibblewhite v. McMorine*, it has generally been held that a contract for the sale and future delivery of personal property is not void at common law, merely because the seller did not then own the same, provided he had a bona fide intention of obtaining it by purchase, manufacture or otherwise, before the day of promised delivery. See *Stanton v. Small*, 3 Sandf. 230 (1849); *Cassard v. Hinman*, 1 Bosw. 207 (1857); *Porter v. Viets*, 1 Biss. 177; *Logan v. Musick*, 81 Ill. 415 (1877); *Wolcott v. Heath*, 78 Ill. 433 (1875); *Clarke v. Foss*, 7 Biss. 540 (1878), a valuable case on this point.

Nor are such contracts void at common law merely because it is therein made optional in either party to fulfil it or not as he chooses. If a seller is willing to absolutely bind himself to sell and deliver at a certain price, and allow the buyer to take it or not at his option, there is no illegality in the contract. Whether it would be binding without some other consideration than such a promise to take is another question. And apparently a consideration is usually

advanced by the party who has the privilege by the contract. But aside from the question of consideration, optional contracts—in which one may be bound and the other not,—are of course not illegal at common law; *Giles v. Bradley*, 2 Johns. Cas. 253 (1801); *Disborough v. Neilson*, 3 Johns. Cas. 81 (1802); *Pixley v. Boynton*, 79 Ill. 351 (1875); *Bigelow v. Benedict*, 70 N. Y. 202 (1877).

Optional contracts are sometimes forbidden by statute. Such is the case in Illinois and probably elsewhere: Rev. Stat. c. 38, sect. 130. But optional contracts in which the only option reserved is, on *what particular day*, within a given time, the seller shall deliver, are not contrary to the statute of Illinois: *Pixley v. Boynton*, 79 Ill. 351; *Gilbert v. Gaugar*, 10 Ch. Leg. News, p. 340 (1877).

All optional contracts, therefore, are not *per se* illegal. A bargain for an option may be legitimate and for a proper business object. But as such agreements can be readily prostituted to the worst kind of gambling ventures, their character may be weighed by a

¹ Our readers will find a note upon the same subject, *ante*, p. 229, the two having been simultaneously prepared without knowledge of each other.

jury in considering whether the bargain was a mere scheme to gamble upon the chance of prices. The form of the venture, aided by other evidence, may clearly indicate a purpose to wager upon the rise or fall in the price of an article, at some future day, and not to deal in the article as men usually do in that business. But gambling is not to be confounded with honest speculation. Therefore it was held in *Kirkpatrick v. Bonsall*, 72 Penn. St. 135 (1872), that the court could not say that on its face, such a contract as the following was illegal :

"Nov. 10th 1870. In consideration of \$1000, we agree to deliver B., should he call for it, during the first six months of 1871, 5000 barrels of oil. If said oil is called for, this call becomes a contract; ten days' notice shall be given, and B. agrees to receive and pay for the same cost on delivery, at 10½ cents a gallon." And a similar view was taken of an optional contract for gold, in *Bigelow v. Benedict*, 70 N. Y. 204 (1877). See also, *Barry v. Crosby*, 2 Johns. & Hem. 2 (1861).

It is real intention of the parties, which makes such contracts valid or invalid, and it has been thought that such unlawful intention must have been mutual, in order to make the contract void. A secret intention of one party not to fulfil his contract unknown to the other would not have that effect: *Clarke v. Foss*, 7 Biss. 540 (1878). And the intention of the parties in making such contracts, is one of fact for the jury, to be determined if need be by extrinsic evidence; and the admission of such evidence does not violate the rule that parol evidence is not admissible to contradict or vary a written agreement: *Cassard v. Hinman*, 1 Bosw. 207 (1857). And see *In re Morgan*, 2 DeGex, F. & J. 634 (1860). And of course the party himself, if a witness, may be asked what his real intention was: *Yerkes v. Salomon*, 18 Hun 471 (1877).

Selling an article "short," is not therefore, *ipso facto*, a wager and illegal. It may be evidence of a wager, but there must be other facts to characterize the transaction, and to show that the actual intention of the parties was to wager merely upon the prospective price: *Marton v. Gheen*, 75 Penn. St. 168 (1874); *Smith v. Bouvier*, 70 Id. 325 (1872); *Appleman v. Fisher*, 34 Md. 540 (1871).

These optional contracts are often styled, "puts" and "calls." A "put," in commercial language, is a contract in which the seller retains the privilege of delivering or not delivering the subject-matter of the sale at his option; and a "call" is one which in the buyer has the privilege of calling or not calling for it at the time named.

The law in regard to such contracts was carefully examined in *Chandler's Case*, 13 Am. Law Rep. N. S. 310 (1874). There Chandler of Chicago, seeking to make a corner in oats for June 1872, purchased all the "cash oats," and took all the "options" offered him for June delivery, his object being to put all the oats in market, and compel those who had sold "options" for June to pay his price, or settle with him by paying the difference between the prices he paid for the options, and the price he should establish in June. He purchased about 2,500,000 bushels for cash, and bought June options for about 3,000,000 more. The total amount of oats in Chicago during the whole month of June was only about 3,500,000 bushels. As part of the arrangement for creating a corner, Chandler also sold what are called "puts," or privileges of delivering him oats during the month of June, for 41 cents a bushel, for which the other party paid ½ cent a bushel for the quantity named in the contract, which read thus: "Received of A. B. \$50, in consideration of which, we give him the privilege of delivering to us, or not, prior to 3 o'clock P. M. of June 30th 1872, 10,000 bushels oats, at 41 cents a

bushel; and if delivered, we agree to receive and pay for the same at the above rate." The total quantity contracted for by these "puts" was about 3,700,000 bushels, and for which Chandler received at the rate of $\frac{1}{2}$ cent a bushel, about \$18,500. Before the last day of June, oats declined about 26 cents a bushel, and the holders of the puts claimed of Chandler the difference between the market price of the oats and 41 cents a bushel, which Chandler had agreed to pay, or about \$400,000. Chandler failed and went into bankruptcy, and the creditors sought to prove the amount of their loss against his estate; which BLODGETT, J., disallowed, on the ground not only that the transaction was a wager, and contrary to the statute of Illinois, but also void at common law, as contrary to public policy. The opinion of Judge BLODGETT well deserves perusal. See also *Ex parte Young*, 6 Bissell 56, (1874); *In re Green*, 7 Bissell 338 (1877).

In *Brua's Appeal*, 55 Penn. St. 294 (1867), it was held that a contract to purchase stocks without the intention to deliver or receive them, is a gaming contract and void. And this was directly affirmed in *Swartz's Appeal*, 3 Brewst. 131 (1869). In *Pickering v. Cease*, 79 Ill. 327 (1875), it was held that a contract for the sale and future delivery of grain, by which the seller has the privilege of delivering or not delivering, and the buyer that of calling or not calling for the grain, as each may choose, and which on maturity is to be fulfilled by adjusting the differences in the market value, is an "optional contract," and in the nature of gambling transactions, and void even at common law, as well as under the statute of Illinois.

So in *Lyon v. Culbertson*, 83 Ill. 34 (1876), it was held that a contract for the sale of grain in store, to be delivered at a future time, with a provision that the parties shall put up margins as security, and that if either party fails, a notice to put up further margins, accord-

ing to the market price, the other may treat the contract as filled at the then market value, and recover the difference between such market price and the contract price, and without any offer to perform on his part, or showing an ability to perform, is illegal.

In *Rudolph v. Winters*, 7 Neb. 126 (1878), the defendant deposited money in the plaintiff's hands, to be invested in grain options in Chicago, in which venture each party was to receive a proportion of the profits and bear the losses, and the loss largely exceeded the amount invested by both parties, which losses the plaintiff paid and charged the defendant. He was not allowed to recover. See also *Sampson v. Shaw*, 101 Mass. 145 (1869).

Thus far the question of the validity of the contract seems to have arisen between the parties to it, and not between one party and his broker whom he had employed to negotiate the contract, as in *Thacker v. Hardy*, *supra*. Whether an agent may recover of his principal, may depend upon two considerations: 1st, upon the language of the statute, if there be one, which prohibits such contract; and 2d, upon the guilty participation of the broker or agent in aiding the party to violate the statute.

If a statute merely declares a contract void, but does not clearly make it *illegal*, an agent or broker who advances his funds or services to his principal to enable him to make or fulfil a merely void contract, is not precluded from recovering. Some contracts are void under the Statute of Frauds, but not "illegal;" and any person who lends money to enable a party to fulfil a contract void under that statute, would be surprised to hear he could not recover it back of the borrower; and of course he could: *Parole v. Gunn*, 4 Bing. N. C. 445.

But if the contract be made "illegal" by the statute, an agent who knowingly contributes by money or services to enable his principal to violate the law can not recover. It is for this reason that

one who lends a friend money to gamble with, knowing the purpose, cannot recover the loan: *McKinnell v. Robinson*, 3 M. & W. 434; *White v. Buss*, 3 Cush. 448; because by statute, that gambling contract was illegal and not merely void. So if a stock-jobbing act makes contracts in stocks not then owned illegal, one who knowingly lends money to enable one to pay up his losses by such a contract, cannot recover it: *Cannan v. Bryce*, 3 B. & Ald. 179. And see *De Begnis v. Armistead*, 10 Bing. 105.

But as the stock-jobbing act under which *Cannan v. Bryce*, was decided, is repealed in England by stat. 23 Viet. c. 28, such contracts are now simply "void," under 8 & 9 Viet. c. 109, and of course a different decision might now be made on the same state of facts.

But as the statute of 8 & 9 Viet. c. 109, on which *Thacker v. Hardy*, was decided, merely makes a wagering contract in stocks "void," but not illegal, it has frequently been held that a person who helps another to fulfil such a void contract by loaning him money, or paying the amount due to the other party, may recover it back of the party for whom and at whose request he advanced it. See *Knight v. Cambern*, 15 C. B. 562; *Oulds v. Harrison*, 10 Exch. 572; *Rosewarne v. Billing*, 15 C. B. N. S. 316; *Jessopp v. Lutwyche*, 10 Ex. 614.

Several American decisions are in harmony with the decision of *Thacker v. Hardy*; holding that when a broker has made contracts for the future sale or delivery, on the order of his principal, he may recover for his fees and disbursements, notwithstanding the principal did not intend to either take or deliver according to the broker's contract, but merely "to settle the differences," at the maturity of the contract; and especially when it did not clearly appear that the broker was aware of such intention. The most notable, perhaps, in support of this view are *Lehman Brothers v. Strassberger*, 2 Woods 554 (1873); *Gilbert v. Graugar*,

10 Ch. Leg. News 340 (1877); *Clarke v. Foss*, 7 Bissell 540 (1878).

In *Ramsey v. Berry*, 65 Me. 570, the defendant, having no wheat to sell, employed the plaintiff, a broker, to sell 10,000 bushels at \$1.30 per bushel, to be delivered any time during May 1872, and deposited \$700 as a "margin," to secure the plaintiff against loss in the rise of wheat; and the plaintiff as agent for the defendant, made contracts to sell accordingly. Wheat rose above \$1.30, and the plaintiff was obliged to settle with his customers at a loss of about \$3000. He was allowed to recover of the defendant, the balance of this, above his \$700 margin, although he knew the defendant did not own any wheat when he made the bargain with him. Three judges dissented, one did not sit, and four concurred in the decision. This difference of opinion may perhaps have been in part owing to the reason that the facts had not been distinctly determined by the jury, as they should have been, and so no clearly defined question of law was presented to the court.

A different view seems to have been taken in Pennsylvania. *Farrira v. Gabell*, 4 Weekly Notes 572 (1877). So in *Green's* case, 7 Bissell 338, it was held that a broker, or agent of the buyer who makes the bargain and pays the "differences" to the seller, knowing the character of the transaction, cannot recover of his principal the amount so paid. And see *Tenney v. Foote*, 11 Ch. Leg. News 71 (1878). But these may have proceeded on the ground that such speculating contracts in gold or grain, are not only void, but "illegal," either at common law, or by force of some local statute, and that the plaintiff could not make out his own case, without showing the illegal contract between the defendant and the third party; and upon that state of facts, the decisions would be in harmony with the well-settled principles of law.

EDMUND H. BENNETT.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹SUPREME COURT OF ILLINOIS.²SUPREME COURT OF IOWA.³SUPREME COURT OF MISSOURI.⁴COURT OF ERRORS AND APPEALS OF NEW JERSEY.⁵

ABATEMENT.

Proceeding on Guardian's death.—A proceeding in the County Court against a guardian to compel him to account, is not a suit either at law or in equity, and abates on the death of the guardian : *Harvey v. Harvey*, 87 Ills.

ASSUMPSIT.

Payment when recoverable back.—When the assignee of a purchaser of land, who has contracted to sell the land to another, who demands to see his deed therefor, is compelled to pay the original vendor more than is due him, in order to get a deed to satisfy his vendee, and the payment is made under protest, it is a fair question of fact for the jury whether the payment is not involuntary, and made under a sort of moral duress, and if so the excess above the real sum due may be recovered back in assumpsit under the common counts : *Pemberton v. Williams*, 87 Ills.

ATTORNEY. See *Conflict of Laws* ; *Damages*.

BANK. See *Corporation* ; *Partnership*.

BANKRUPTCY.

Claim for Captured or Abandoned Property.—Act of Congress of 1853.—A claim against the government for the proceeds of cotton belonging to a bankrupt, captured by the military forces of the United States and sold, and the proceeds paid into the treasury, constitutes property, and passes to his assignee in bankruptcy, though from the bar of the statute, the claim be not enforceable in the Court of Claims or by any legal proceedings : *Erwin v. The United States*, S. C. U. S., Oct. Term 1878.

The Act of Congress of February 26th 1853, to prevent frauds upon the treasury of the United States, applies only to cases of voluntary assignment of demands against the government. It does not embrace cases where there has been a transfer of title by operation of law. The passing of claims to heirs, devisees or assignees in bankruptcy is not within the evil at which the act aimed : *Id.*

¹ Prepared expressly for the American Law Register, from the original opinions filed during October Term 1878. The cases will probably be reported in 7 or 8 Otto.

² From Hon. N. L. Freeman, Reporter ; to appear in 87 Illinois Reports.

³ From John S. Runnells, Esq., Reporter ; to appear in 47 Iowa Reports.

⁴ From T. K. Skinker, Esq., Reporter ; to appear in 67 Missouri Reports.

⁵ From John H. Stewart, Esq., Reporter ; to appear in 30 N. J. Eq. Reports.

Evidence—Assignee's Deed.—It is not required that a complete transcript of the record and files shall be given in evidence to support the deed of an assignee in bankruptcy. A certified copy of the order decreeing bankruptcy and appointing the assignee, is sufficient under the Act of Congress. All such deeds, reciting the decree in bankruptcy and the assignee's appointment, supported by a certified copy of such decree, are made full and complete evidence both of the bankruptcy and the assignment, and supersede the necessity of any other proof to validate such deeds: *Heath v. Hyde*, 87 Ills.

BILLS AND NOTES.

Delivery of Note to Maker.—The delivery of a note by the holder to the maker, with intent thereby to discharge the debt, does discharge it: *Vanderbeck v. Vanderbeck*, 30 N. J. Eq.

COMMON CARRIER.

Passenger no right to sell Goods.—A party cannot maintain an action against the captain of a boat for preventing her from selling her goods on his boat on an excursion, she having obtained no permission for that purpose; nor can she recover when the captain put her goods into the baggage-room, and could not deliver them to her, owing to the crowd getting off the boat until it was too late for her to get them conveyed to the grounds of a picnic where she expected to make sales: *Smallman v. Whilter*, 87 Ills.

CONFLICT OF LAWS. See *Interest*.

Confession of Judgment by Attorney pertains to Remedy—Confession of cannot be made by Attorney.—A confession of judgment pertains to the remedy, and is therefore governed by the law of Iowa. A contract made in another state authorizing a confession to be made by an attorney will not be enforced there: *Hamilton v. Shoenberger*, 47 Iowa.

CONFUSION OF GOODS.

Party Causing it to bear Loss.—If a party having charge of the property of others, so confounds it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produced it, and it is for him to distinguish his own property or lose it: *Jewett v. Dringer*, 30 N. J. Eq.

A junk dealer, by fraudulent collusion with the employees of a railroad corporation, obtained large quantities of old iron, &c., at much less than the actual weight or value. On delivery it was thrown indiscriminately on other heaps of old iron, &c., belonging to him, so as to be indistinguishable. *Held*, that he must forfeit the whole mass to the company: *Id.*

CONTRACT. See *Equity*.CORPORATION. See *Receiver*.

Stockholder of Bank—Liability to Creditors.—Under the charter of the bank of Chicago, which provided that "each stockholder shall be liable to double the amount of stock held or owned by him, and for three months after giving notice of transfer, &c.," it was *held*, that a

stockholder assumed a primary liability to creditors of the bank, to an amount double his stock, and not a secondary one; and having incurred such liability, he was not released therefrom by his not being sued within three months after a transfer of his stock: *Fuller v. Ledden*, 87 Ills.

COVENANT. See *Vendor*.

CRIMINAL LAW.

Defendant as Witness—Liability to Impeachment.—When a defendant in a criminal case testifies in his own behalf, the state may impeach his character before he offers any evidence that it is good; his testimony is subject to the same rules and tests as that of any other witness: *State v. Cox*, 67 Mo.

In impeaching a witness, evidence of his reputation for general moral character, as well as of that for truth and veracity, is admissible; but before permitting witnesses to testify as to such reputation, they must show that they are acquainted with it: *Id.*

If a defendant in a criminal case becomes a witness in his own behalf, as permitted by the Act of April 18th 1877, he thereby subjects himself to the same rules as to cross-examination and impeachment as other witnesses: *State v. Clinton*, 67 Mo.

CUSTOM.

Dealings with Reference to Particular Markets.—A person who deals in a particular market must be taken to deal according to the known, general and uniform custom or usage of that market, and he who employs another to act for him at a particular place or market, must be taken as intending that the business will be done according to the custom and usage of that place or market, whether the principal in fact knew of the usage or custom, or not: *Bailey v. Bensley*, 87 Ills.

DAMAGES.

Attorney's Fees.—In an action for breach of covenant of warranty the grantee may recover taxable costs, but before he can recover his attorney's fees he must show that he has paid, or is under obligation to pay, some specified sum. He cannot recover what he may show are reasonable fees without proof that he has incurred liability to that extent: *Swartz v. Ballou*, 47 Iowa.

Contract for Personal Service—Breach.—If an employee who is under contract to serve his employer for a fixed period leaves the service before the expiration thereof, he is not entitled to recover what may be his due after deducting damages for the breach of contract until the time of payment fixed therein: *Powers v. Wilson*, 47 Iowa.

DEBTOR AND CREDITOR.

Fraudulent Conveyance.—An administrator of an estate, under an order of court, cannot sell and convey any interest in lands sold and conveyed by his intestate in his lifetime to defraud his creditors. If he does so sell and convey, his grantee cannot maintain a bill to avoid the fraudulent conveyance, because no title passes, for want of power in the administrator: *Beebe v. Saulter*, 87 Ills.

DEED.

Mistake—Equity—Subsequent Grantee with Notice.—A mortgagor intended to give, and the mortgagee expected to receive, a mortgage in fee, but, for want of words of inheritance, the mortgage, as executed, conveyed only an estate for life. A second mortgagee had such actual notice of the first mortgage as induced the belief that it was a mortgage of the fee, and, so believing, took the second mortgage. *Held*, that, as against the second mortgagee, the first mortgage should be regarded as a mortgage of the fee: *Gale v. Morris*, 30 N. J. Eq.

DURESS. See *Assumpsit*.

EQUITY.

Fraud—Practice—Parties.—A deed to purchasers under a judgment and sale made by an auditor in attachment, cannot be avoided on the ground of false claims by creditors, and an irregular, fraudulent and inadequate sale, without making the creditors and auditor parties: *Wilson v. Bellows*, 30 N. J. Eq.

This defect, in not joining proper parties, is good ground for demurrer, where it appears on the face of the bill: *Id.*

When the purchasers are not charged with fraud, relief against them will only be granted on equitable terms; such as offering to refund the purchase-money. They will not be compelled to look to others who are not parties to the bill: *Id.*

Indispensable Party to Suit.—K., a citizen of Tennessee, filed a bill in the Circuit Court against D., a citizen of Ohio. The controversy related to one hundred and eighty-four shares of the stock of the Memphis Gas-Light Company, which company was not made a party to the suit. The substance of the bill was, that plaintiff was the owner of the shares of the gas company stock already mentioned, and that while he so owned and held the stock, and during the late civil war, the defendant "obtained possession of the books and control of the offices of the company, and being so in possession and control, wrongfully and fraudulently procured and obtained to be made a transfer upon the books of the company to his own name as owner, and from the name of your orator, the said one hundred and eighty-four shares of stock, and the issuance to him of a certificate of said stock, and the cancellation of the certificate of his stock belonging to and in the name of your orator." The relief prayed was that the said capital stock might be restored to the plaintiff, and that said D. might be compelled to cause and authorize the transfer of said stock to be made on the books of the company to the plaintiff, and might be enjoined from making, or authorizing to be made, a transfer of any of the stock to any other person: *Held*, that the Circuit Court has no jurisdiction to try the case, because the gas-light company was an indispensable party to the relief sought in the bill, or to any relief which a court of equity could give: *Kendig v. Dean*, S. C. U. S., Oct. Term 1878.

Mistake—Rectification of Contract.—Where an oral contract is afterwards reduced to writing, and the writing fails to express in apt and proper terms the real intention of the parties through a mistake of the

draftsman, equity will permit the mistake to be corrected: *Nowlin v. Pyne*, 47 Iowa.

Practice—Demurrer to Bill.—When there is a demurrer to the whole bill, and also to part, and the latter only is sustained, the regular decree is to dismiss so much of the bill as seeks relief in reference to the matters adjudged bad, and to overrule the demurrer to the residue, and direct the defendant to answer thereto: *Giant Powder Co. v. California Powder Works*, S. C. U. S. Oct. Term 1878.

Action by United States—Attorney General—Chancery Jurisdiction to grant Relief on the ground of Fraud.—It is essential to a bill in chancery on behalf of the government to set aside a patent, or a confirmation of land title under a Mexican grant, after it has become final, that it shall appear in some way, without regard to the special form that the attorney general has brought it himself, or given such authority for it as will make him officially responsible, and show his control of the cause through all stages of its presentation: *The United States v. Throckmorton et al.*, S. C. U. S., Oct. Term 1878.

The frauds for which a bill in chancery will be sustained to set aside a judgment or decree between the same parties, rendered by a court of competent jurisdiction, are frauds extrinsic or collateral to the matter tried by the first court, and not a fraud which was in issue in that suit: *Id.*

The cases in which such relief has been granted are those in which, by fraud or deception practised on the unsuccessful party, he has been prevented from exhibiting fully his case, by reason of which there has never been a real contest before the court of the subject-matter of the suit: *Id.*

EVIDENCE. See *Criminal Law*.

Person not heard from for Seven Years—Presumption.—A person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death: *Davie et al. v. Briggs*, S. C. U. S., Oct. Term, 1878.

But that presumption is not conclusive, nor is it to be rigidly observed without regard to accompanying circumstances which may show that death in fact occurred within the seven years: *Id.*

If it appears in evidence that the absent person, within the seven years, encountered some specific peril, or within that period came within the range of some impending or immediate danger, which might reasonably be expected to destroy life, the court or jury may infer that life ceased before the expiration of the seven years: *Id.*

Where a party has been absent seven years, without having been heard of, the only presumption arising is that he is then dead, there is none as to the time of his death: *Id.*

Proof of Handwriting.—When the genuineness of a written instrument is the subject of investigation, it is not competent to prove the execution of other papers having no connection with the case, and then, by the testimony of experts, who have compared them with the instru-

ment in question, to show that the latter is a forgery: *State v. Clinton*, 67 Mo.

EXECUTOR. See *Usury*.

FRAUD. See *Equity*.

Sham Bid.—If one, by fraud procures a sham bid on his property, when offered for sale, by an irresponsible person, and thereby succeeds in having the land of another sold to pay off a portion of the debt he is equitably bound to pay, such injured party may recover back the sum so lost by him in the sale of his property, or the sum realized by the other, with interest: *Darst v. Thomas*, 87 Ills.

FRAUDS, STATUTE OF.

Original or Collateral Undertaking.—An original undertaking to retain attorneys to attend to a suit for a third person may be implied from circumstances, but one collateral to answer for the debt of another cannot, as it must be in writing. Whether a party's undertaking is original or merely collateral, is a question of fact for the jury: *Mashier v. Mitchell & Arnold*, 87 Ills.

FRAUDULENT CONVEYANCES.

Sale of Goods—Change of Possession.—The actual and continued change of possession, contemplated by the statute in relation to fraudulent conveyances (1 W. S. p. 281, § 10), must be open, notorious and unequivocal—such as to apprise the community, or those accustomed to deal with the vendor, that the goods sold have changed hands, and that the title has passed from the vendor to the vendee (following *Clafin v. Rosenberg*, 42 Mo. 439, and other cases): *Wright v. McCormick*, 67 Mo.

If the purchaser of a stock of goods permits them to remain at the vendor's place of business, without removing his business sign, the change of possession is not unequivocal within the meaning of the foregoing rule, notwithstanding it may appear that when the sale was made, the purchaser, in the presence and with the consent of the vendor, notified the vendor's clerks of the fact and told them that in dealing with the goods in the future they were to act for him, and that the vendor was to have no further control over them, and that he did not, in fact, exercise any further control with the purchaser's consent.

HIGHWAY.

Dedication—Proof of Intent.—To show that title is acquired to land for a public road by dedication, the proof should be very satisfactory, either of an actual intention to dedicate, or of such acts and declarations, as should equitably stop the owner from denying such intention: *Kyle v. Town of Logan*, 87 Ills.

HUSBAND AND WIFE.

Residence—Divorce.—In law the domicile of the husband is that of his wife, and her residence follows that of the husband. When a husband acquires a new home it is the duty of his wife to go with him, and if she refuses, without justification, for two years, the husband will be entitled to a divorce: *Kennedy v. Kennedy*, 87 Ills.

INSOLVENT.

Preference of Debt to State.—New Jersey does not possess the crown's common law prerogative to have its debts paid in preference to the debts of other creditors; *Board of Freeholders of Middlesex Co. v. State Bank*, 30 N. J. Eq.

INSURANCE.

Statements of Soliciting Agent—Notice to Agent—Such Agent acts for Company, not for insured.—Parol evidence is admissible to show that the assured stated to the solicitor of the insurance company who received the application the fact that there was an encumbrance upon the property insured: *Boetcher v. Hawkeye Ins. Co.*, 47 Iowa.

Notice to a soliciting agent, who is authorized to fill up applications for the assured, to receive premiums and forward the same with the application to the company, and whose agency thereupon ceases, is notice to the company: *Id.*

A policy of insurance expressly stipulated that the soliciting agent who took the application was the agent of the assured; the latter was not advised of the fact at the time of the negotiation, when the application was signed and the premium paid; the policy further provided that the insurance might be terminated at the option of the company: *Hell*, that the assured had the right to believe the soliciting agent was the agent of the company, and the insertion of the clause in the policy providing that he was the agent of the assured constituted a fraud upon the latter, of which the company could not take advantage: *Id.*

Notice of Loss.—Where a policy of insurance required immediate notice to be given by the assured in case of a loss, and in the great fire in Chicago on October 9th 1871, the plaintiff's property insured was burned, notice of the loss given November 13th 1871, was held to have been given in sufficient time, in view of the great derangement in all kinds of business caused by the fire: *Knickerbocker Ins. Co. v. McGinnis*, 87 Ills.

INTEREST.

Conflict of Laws—Lex Loci—Different Rates of Interest.—Where bonds were executed in New York and made payable there, it was held that delinquent interest thereon drew interest at the rate of six per cent. Following *Preston v. Walker*, 26 Iowa 205: *Burrows v. Stryker*, 47 Iowa.

A decree will draw only the rate of interest of the debt, and if a part of the debts drew one rate of interest and a part another, the decree will in like manner draw different rates of interest: *Id.*

JUDGMENT.

Judgment by Confession.—When a judgment by confession under a warrant of attorney is opened, and the defendant allowed to plead a defence, the court has no right to require the defendant to bring into court the sum supposed to be due, as a condition to opening the case. The judgment may be allowed to stand as a security for the condition, till after the trial of the issues tendered on the defence: *Page v. Wallace*, 87 Ills.

LIMITATIONS, STATUTE OF.

New Parties—Subrogation.—The administrator of a deceased sheriff having sued upon a note given to his intestate for the purchase-money of land sold by him under a decree of court, the sureties of the deceased, who had been compelled to pay to the parties entitled the amount for which the land sold, claiming the right to be subrogated in place of the administrator, caused themselves to be substituted as plaintiffs in the action more than ten years after the maturity of the note. *Held*, that as they virtually commenced a new action—one in equity, instead of the action at law upon the note—they were barred by the Statute of Limitations, although the action, as originally brought, was not barred: *Sweet v. Jeffries*, 67 Mo.

MORTGAGE. See *Decd.*

NEW TRIAL.

When Chancery will grant a New Trial at Law.—Where a plaintiff's attorney brings a case on for trial in the absence and without the knowledge of the defendant and his attorney, in violation of a written stipulation to give ten days' previous notice of an intention to try the case, a court of equity will grant a new trial, if it appears that the judgment is unjust, and this though relief may be had at law by motion to set aside the judgment: *Foot v. Despain*, 87 Ills.

PARTNERSHIP.

Improper Payment of Partnership Funds.—If a bank pays out the money of a partnership, to one of the partners upon his check, in fraud of the rights of the other partners, an action at law cannot be maintained in the firm name against the bank, but a resort must be had to a court of equity for the relief of those partners claiming to be injured: *Church v. First Nat. Bank of Chicago*, 87 Ills.

PAYMENT. See *Assumpsit.*

Mistake in.—In the case of the sale of milk by the can, if by mistake of the parties the milk delivered is short of the quantity intended, owing to the cans not holding the amount supposed, and the vendor receives more money on that account than he is entitled to, he must account for the same, even though the purchaser was negligent in discovering the mistake: *Devine v. Edwards*, 87 Ills.

PATENT.

Re-issue—Must be for same Invention.—A re-issued patent must be for the same invention as that which formed the subject of the original patent, or for a part thereof, when divisional re-issues are granted. It must not contain anything substantially new or different: *Giant Powder Co. v. California Powder Works*, S. C. U. S., Oct. Term 1878.

An original patent for a process will not support a re-issued patent for a composition, unless the composition is the result of the process, and the invention of the one involves the invention of the other: *Id.*

A patent granted for certain processes of exploding nitro-glycerine will not support a re-issue for a composition of nitro-glycerine and gun-

powder or other substances, even though the original application claimed the invention of both process and compound. They are distinct inventions: *Id.*

PRESUMPTION. See *Evidence*.

PROHIBITION.

Writ does not lie to arrest a proceeding at law for defect of parties, as when a suit which should be brought in the name of the state is brought in the name of private persons: *Bowman's Case*, 67 Mo.

RAILROADS.

Rights of Passengers as to Tickets—Payment of Fare—Putting Passengers off for Non-payment.—The purchase of a ticket constitutes a contract between the company and passenger, in accordance with which the former undertakes to carry the latter to his destination on the particular train he takes and no other, unless he is permitted by some regulation of the company, upon compliance with some condition, to stop over at an intervening station and resume his journey by another train. The contract for the transportation of the passenger is an entirety, and if without the consent of the company he stops before reaching his destination, he cannot again impose the obligation of the contract upon the company by insisting that he shall be carried the remainder of the journey: *Stone v. C. & N. W. Railroad Co.*, 47 Iowa.

A passenger who refuses to pay his fare becomes a trespasser, not entitled to the rights and privileges of a passenger, and may rightfully be ejected from the train by an employee of the company: *Id.*

By refusal to pay his fare the passenger deprives himself of the right to insist upon courteous treatment from the company's employees and cannot complain of their misconduct: *Id.*

The cause of action being a breach of contract to carry, the passenger cannot be permitted to show that he was ejected from the train with insult and abuse, or that the conductor was intoxicated: *Id.*

Testimony to the effect that the plaintiff had been permitted at other times to stop over at intervening stations, and ride upon subsequent trains, with the same ticket, and without "stop-over" checks, was held inadmissible: *Id.*

Where a passenger has been ejected from a train for non-payment of fare, he must pay the fare from the station where he first entered the train before he can insist upon being carried forward upon the same train, and if he purchase a ticket at the point where he was ejected, the conductor may nevertheless exclude him from the train: *Id.*

That the passenger attempted to re-enter the train with good intent and without a purpose to defraud the company would not aid him to a recovery: *Id.*

RECEIVER.

Title.—On the appointment of a receiver of an insolvent corporation, its title to its property is divested by force of law: *Board of Chosen Freeholders of Middlesex County v. State Bank*, 30 N. J. Eq.

When his Title Accrues.—The title of a receiver to the property

which is the subject of the receivership, attaches from the date of the order of court appointing him; it is not deferred until he gives bond in compliance with the order: *Maynard v. Bond*, 67 Mo.

SERVANT. See *Damages*.

SMUGGLING. See *Statute*.

STATUTE.

In Derogation of Common Law.—Statutes in derogation of the common law are to be so construed as not to infringe upon the rules or principles of the common law to any greater extent than is plainly expressed: *State v. Clinton*, 67 Mo.

Repeal by subsequent Act is Judicial not Legislative Question.—*Acts of Congress against Smuggling.*—An action of debt cannot be maintained at the suit of the United States to recover the penalties prescribed by the fourth section of the Act of Congress, approved July 18th 1866, entitled "An Act to prevent smuggling, and for other purposes." That act contemplated a criminal proceeding, and not a civil remedy: *The United States v. Cluffin et al.*, S. C. U. S., Oct. Term, 1878.

Nor does section 3082 of the Revised Statutes authorize a civil action: *Id.*

A recital in a statute that a former statute had been repealed or superseded by subsequent acts, is not conclusive that such a repeal or supersedure had been made. Whether a statute was repealed by a later one is a judicial not a legislative question: *Id.*

When a new statute covers the whole subject-matter of an old one, adds offences, varying the procedure, the latter operates by way of substitution, and not cumulatively. The former is, therefore, impliedly repealed. It is, however, necessary to the implication of a repeal that the objects of the two statutes are the same, in the absence of any repealing clause. If they are not, both statutes will stand, though they refer to the same subject: *Id.*

TROVER.

Effect of Judgment on Title—Former Application—Damages.—A judgment in trover, without satisfaction, does not pass the title of the property to the defendant: *Atwater v. Tupper*, 45 Conn.

The plaintiff brought two actions of trover at the same time against A. and B., who had severally converted the same property, the conversion by B. being after that by A. He obtained judgment against A., when B. pleaded that fact in bar of the further maintenance of the action, the judgment not having been satisfied. *Held* to be no bar: *Id.*

And *held*, that the judgment was to be for the full value of the property: *Id.*

The value of the property had been found upon a hearing on the general issue before the filing of the plea in bar of the further maintenance of the action. The plaintiff demurred to that plea and the court sustained the demurrer. The defendant then claimed the right to be heard upon the question of damages. *Held*, that, as the value of the

property had been already found, and was the rule of damages, the defendant was not entitled to a further hearing on the subject: *Id.*

TRUST AND TRUSTEE.

Breach of Trust by Settlement of Individual Debt—Acceptance by Cestui que Trust.—Although a trustee has no right to settle a debt due to him as trustee by merely cancelling one due from himself in his individual capacity to the debtor, yet if the *cestui que trust* adopts the settlement and compels the sureties of the trustee to make good the amount to him, they cannot afterward recover it of the original debtor: *Sweet v. Jeffries*, 67 Mo.

A sheriff sold land under a decree for partition and received a note for the purchase-money. Becoming indebted to the purchaser, he agreed that his debt should be set off against the note, and accordingly executed a deed for the land without collecting the note. The parties entitled to the proceeds of the partition sale sued him and his sureties, alleging that the note had been paid. There was a recovery in this action and the sureties paid the judgment. In an action by them against the maker of the note. *Held*, that the settlement made by the sheriff, though originally unauthorized, had been adopted by the parties in interest and had thereby become binding upon the sureties.

USURY.

By one of two Executors is Good Defence.—One of two executors loaned moneys of the estate on bond and mortgage, reserving usury thereon and appropriating it to his own use. On foreclosure by the executors on behalf of the estate,—*Held*, that such usury could be set up as a defence: *O Neil v. Cleveland*, 30 N. J. Eq.

VENDOR AND VENDEE.

Lien for Purchase-money—Warranty—Eviction.—Upon a bill to enforce a lien for the purchase-money, and where there has been no fraud and no eviction, actual or constructive, the vendee, or a party in possession under him, cannot controvert the title of the vendor, and no one claiming an adverse title can be permitted to bring it forward and have it settled in that suit. Such a bill would be multifarious, and there would be a misjoinder of parties: *Peters v. Bowman*, S. C. U. S., Oct. Term 1878.

In such cases, the vendee and those claiming under him must rely upon the covenants of title in the deed of the vendor. They measure the right and the remedy of the vendee, and if there are no such covenants, in the absence of fraud he can have no redress: *Id.*

Where at the time of the conveyance with warranty, there is adverse possession under a paramount title, such possession is regarded as eviction and involves a breach of this covenant. Where the paramount title is in the warrantor, and the adverse possession is tortious, there is no eviction, actual or constructive, and no action will lie: *Id.*

The covenant of good right to convey is synonymous with the covenant of seizin. The actual seizin of the grantor will support both, irrespective of his having an indefeasible title: *Id.*

These covenants, if broken at all, are broken when they are made. They are personal, and do not run with the land: *Id.*

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THE LAWS OF EVIDENCE AND THE SCIENTIFIC INVESTIGATION OF HANDWRITING.

THE magnitude of the interests involved in the use of written documents can hardly be overestimated, hence the necessity that they should be guarded as far as possible against falsification or fraudulent alteration. A mere enumeration of the many ways in which they enter into the complex relations of modern society would fill volumes, and would require years of study, ranging over the entire history of civilization to record. The preservation of property, character and life itself even, frequently depends upon the integrity of a few words recorded with a pen, and hence the various laws devised to prevent the falsification of writings and the necessity of some sure means of detection in such cases. That such crimes are alarmingly frequent at the present time, and becoming more common every day, cannot be questioned. This I think is more due to the inefficiency of the laws upon the subject, and the unscientific methods of investigation resorted to in many of these cases, than to increased skill on the part of those engaged in such crimes, or to the invention of new methods of working to the same end. Whatever may be the conclusion in this respect, however, it is certain that this class of crimes often escapes detection under the usual methods of investigation as prescribed by the courts, when the evidence is based mainly or as a whole upon that derived from the

visible characteristics of the documents themselves. Though no evidence will be deemed necessary in order to prove the fact, as it regards the vast number of crimes of this description which are brought to our knowledge every day, nevertheless I shall give in brief some account of a few of the cases which have been put into my hands for examination, as I shall have occasion to refer to them when coming to the proof of my proposition, that the present rules of evidence in such cases, and the usual methods of investigation recognised by the courts, so far from tending to prevent the occurrence of such crimes, on the contrary, serve to encourage them, by placing obstacles in the way of their detection. And this is eminently the fact as it regards the most skilful workers in this field of art; for where the result depends wholly upon the comparison of handwritings under the most liberal ruling of the courts, surely, the close resemblance of the work of the skilful forger to that of the writing in question, which is sure to deceive the most accomplished expert where the examination is made through the eye *alone*, or, indeed, by the aid of magnifying glasses without other appliances, would necessitate the giving of a positive opinion in his favor. And it is this opinion which is called evidence and which the jury are expected to weigh in these cases. The lawyers themselves recognise the fact of the unreliable character of this class of testimony, in the common saying that they can prove anything by scientific witnesses. This is but declaring that under the rules of the courts they can and do get men to give opinions, or rather guesses, which they present to the jury as facts, and which are allowed to weigh as evidence. As those who make these rules are themselves lawyers, it would seem as if the responsibility of such a perversion of the very idea of justice should rest on their heads alone.

Surely, no scientific man, nor indeed any one who has the smallest claim to such distinction, were he to reflect for one moment, would allow himself to be used in such a manner. His guesses are of no more value than those of the unprofessional witness. If the expert should be, as he is, disgraced by lending his aid in any manner to such practices, what ought to be our opinion in regard to the courts and the lawyers themselves, who call such testimony competent, and allow cases to be proved and decided by this very class of evidence, which they stigmatize as wholly unreliable.

In no other "science" but that of the law, I submit, would such

methods of investigation be deemed of the least value. In medicine, which is often charged with being mainly dependent upon guessing, the field of investigation is left entirely open, and its methods are wholly unfettered by iron rules which preclude all true progress. The school of Salerno no longer prescribes the observance of the planets, in order to know the times and seasons for gathering medicines or for administering them. The weapon ointment is no longer used in cases of wounds, for the reason that Paracelsus or Sir Kenelm Digby prescribed it. Nor would the decisions of Sir Tumley Snuffee or Mr. Justice Stareleigh have the least influence in fettering the investigations of any modern scientist outside of the field of the law.

I proceed, as necessary to my plan, to give in brief the rules of the courts as regards the examination of written documents; including under the term examination, whatever may be required or allowed to be done in such cases.

"The testimony of experts is receivable in corroboration of positive evidence, to prove that in their opinion the whole of an instrument was written by the same hand, with the same ink, at the same time:" *Fulton v. Hood*, 34 Penn. St. 265.

"All evidence of handwriting except where the witness saw the document written, is in the nature of a comparison. It is the belief which a witness entertains upon comparing the writing in question, with its exemplar in his mind derived from some previous knowledge. * * * It is agreed that if the witness has the proper knowledge of the party's handwriting he may declare his belief in regard to the genuineness of the writing in question. He may also be interrogated upon the circumstances upon which he founds his belief. The point upon which learned judges have differed in opinion is upon the source from which this knowledge is derived rather than as to the degree and extent of it:" 1 Greenl. on Evid., § 576.

"There are two methods of acquiring this knowledge. The first is from having seen him write. It is held sufficient for this purpose that the witness has seen him write but once, and that only his name. * * The second mode is from having seen letters, bills or other documents purporting to be the handwriting of the party, and having afterwards personally communicated with him respecting them, or acted upon them as his, the party having known and acquiesced in such acts founded upon their supposed genuineness, or by such adoption of them in the ordinary business transactions

of life as induces a reasonable presumption of their being his own writings:" 1 Greenl. on Evid., § 577.

"This rule requiring personal knowledge on the part of the witness has been relaxed in two cases. First, where the writings are of such antiquity that living witnesses cannot be had, and yet are not so old as to prove themselves. There the course is to produce other documents either admitted to be genuine or proved to have been respected and treated and acted upon as such by all parties, and to call experts to compare them, and to testify their opinion concerning the genuineness of the instrument in question. Second, where other writings admitted to be genuine are already in the case. Here the comparison may be made by the jury with or without the aid of experts:" 1 Greenl. on Evid., § 578.

Before being admitted to testify as to the genuineness of a controverted signature, from his knowledge of the handwriting of the party, a witness ought beyond all question to have seen the party write or be conversant with his acknowledged signature. The teller of a bank, who as such has paid many checks purporting to be drawn by a person who has a deposit account with the bank, but has not seen him write, if the testimony shows nothing further, is a competent witness to testify as to the handwriting of such a person; but he is not a competent witness to testify to the handwriting of such a person if it appears that some of the checks so paid were forged, and that the witness paid alike the forged and genuine ones: *Brigham v. Peters*, 1 Gray 139, 145, 146.

A witness who has done business with the maker of the note, and seen him write, but only once since the date of the disputed note, may nevertheless give his opinion in regard to the genuineness of the note, the objection going to the weight and not to the competency of the evidence: *Keith v. Lathrop*, 10 Cush. 453.

A third mode of acquiring a knowledge of a person's handwriting is by putting writings acknowledged to be his in the hands of the witness and allowing him to study them and thus become acquainted with the handwriting; and as the result of such study he is in some states, though upon this point there is a conflict, admitted to be competent to testify as to the case in question; that is, to examine the document in the case and to give his opinion as to its genuineness. See the authorities, collected in 1 Greenl. Evid., § 579-581, and notes.

The reasons for refusing to allow such comparisons of handwrit-

ings are: 1st. The danger of fraud in the selection of writings offered as specimens for the occasion, or if admitted, their genuineness may be contested and others successively introduced, to the infinite multiplication of collateral issues and the subversion of justice: 1 Greenl. Evid., § 580.

I next proceed to quote other learned authorities on this part of my subject, some of them opposed to the rules, but all resting upon the false idea, as I conceive it to be, that *opinions* based upon a comparison of handwritings as a question of resemblance or non-resemblance in form alone should have weight as testimony in courts of justice. The more close the likeness the more danger is there, of course, of coming to a false conclusion, and herein lies the danger, as I have illustrated more fully in another part of my paper. Again, there is as great difference in the ability of persons to recognise variations in form as there is in the power of distinguishing color. Many persons are *form-blind* as well as color-blind, and of this they are, of course, themselves unaware hence, perhaps, in many cases the conflicting testimony of witnesses in this respect. Were they required to give reasons for their opinions in such cases, the discrepancy would be self-evident.

This rule would not include such comparison as a means of showing points of difference in handwriting, where such points of difference were made use of by the expert, in connection with other facts which, on account of their relation to each other and to these first also, might help him to come to a conclusion.

“Evidence of handwriting, like all *probable* evidence, admits of every possible degree, from the lowest presumption to the highest moral certainty, and affects the jury accordingly:” 21 Ill. 415, per BREESE, J.

It will be seen that this dictum is based upon the idea that such evidence is deducible from a comparison of handwritings, as before explained, which, as I have said before, is less conclusive in those cases where the samples compared most resemble each other; for the expert forger, as has been frequently proved, finds but little difficulty in producing *fac similes* of the writings he wishes to imitate; and of course, the so-called expert, in these cases, under the usual methods of examination, can only testify that in his opinion such specimens are genuine. Thus the highest “moral certainty” of the learned judge (and I submit of the courts generally), becomes the strongest physical uncertainty, so that when the court and jury were most affected in this direction, there would be the greater

reason to doubt, or at least to make a thorough scientific examination of the writing in question.

Yours Truly
Florence McCarthy

Yours Truly
Florence McCarthy

E. A. Storm

E. A. Storm
Yours Truly

Yours Truly
M. D. Ewell

M. D. Ewell

I give, as an illustration of this statement, engravings from the handwriting of three well-known citizens of Chicago, and also imi-

tations of the same. One of each is, of course, from a genuine specimen and one from an imitation. They have been photographed directly on the wooden block, and are hence perfect *fac similes* of the originals. The imitations were made somewhat different in size from the genuine ones, in order to show that they have not been traced from the originals. It would be impossible in this case for the most skilful expert, or for the authors of the signatures themselves, to tell the true from the false by means of any method of comparison ordinarily used in the courts, or indeed, by any recognised by the authorities. Still, there is a way by which the true originals could be told from the false with the utmost certainty, and the fact demonstrated so as to be understood by the jury.

"All evidence of handwriting," the judge goes on to say, "except when the witness has seen the disputed document actually written, is in its nature comparison."

"It is only the belief which a witness entertains upon comparing the writing in question with an abstract picture in his mind, derived from some previous knowledge, and he must upon the moment apply that picture or example to the particular writing in question." The exception here laid down in regard to the document not being subject to the same law of recognition, provided the witness saw it written, seems to me not to be quite correct, unless the document had remained in his keeping up to the time of its presentation. He could only recognise it by comparing it with the abstract picture in his mind, painted there at the time it was written, and this same statement would hold good had the document in question been the work of his own hands. It is as necessary to the success of the forger that he be able to bring all parts of his falsified paper in apparent harmony with his model, as that the writing itself should be in the same condition, and this is very often done, and is indeed much less difficult of accomplishment under the rulings of the court than the falsification of the writing itself even.

I have had case after case of the kind where the parties themselves, who had made documents for the express purpose of testing this fact, failed to distinguish between the true and the false; not from the comparison as expressed above of the simulated papers with the image remaining in the mind, or recalled by memory alone, but by the actual presence and comparison of the true and

the false documents with each other. From these facts alone I think we should be warranted in coming to the conclusion that testimony based upon the resemblance or non-resemblance of handwriting, joined with the evidence deduced from the external appearance of the documents, is, if we go no further, of no kind of value whatever, and that we should oftener get justice in such cases by resorting to the old method of settling doubtful questions by casting lots. Indeed, it seems to me that the present system, like loaded dice, is vastly in favor of the expert forger, if not also of the mere beginner or bungler in the art.

In the continuance of his comments upon the rules of the courts in respect to the comparison of handwritings, Judge BREESE goes on to say, "It has been already stated, that a witness who testifies on the subject of a handwriting, gives at best but the result of a mental comparison made by him of the disputed writing, with that which he has seen, and the impression of which remains in his memory. "What difference could it make if this comparison was carried on in the mind, which the rules of evidence allow, or was actually made in the presence of the court and jury? Is speaking from an impression made on the mind more convincing, more worthy of regard and belief than a present conviction produced by actual comparison?" In *Pennsylvania, in Farmers' Bank v. Whitehall*, 10 S. & R. 112, the court, in discussing the matter, say, "It is more satisfactory to submit a genuine paper as a standard and let the jury compare that with the paper in question, and judge of the similitude, than the evidence continually received of allowing a witness who has seen the party write once, to compare the disputed paper with the feeble impression the transient view of the writing may have made upon his memory."

In a recent English case, 4 Phil. Ev. (Cow. and Hill's notes), part 5, p. 478, it is said, "Why is it not as reasonable when a doubtful paper is sought to be made evidence that the opposite party should show by a genuine paper and by a comparison of a disputed paper with it that the probability is against its genuineness?"

The arguments in favor of the rules of the courts it will be hardly necessary for me to notice. They all of them seem to me of as little value as the first mentioned, which contains in its very proposition its answer, *e. g.*, where *genuine* papers are brought forward for comparison, &c. Objection. "The danger of admitting fraudu-

lent ones ; of course no paper should be used for the purpose which would not be admitted by all parties to be genuine. No comparison of the kind would be of the least scientific value except under such conditions.

“ 1st. The testimony of experts may be received to prove that an instrument was written by the same hand, with the same ink, and at the same time.” Suppose every latitude should be allowed in such a case, still, under the received methods, if the paper should be skilfully executed, the witness is pretty sure to come to a wrong conclusion. If he guess at the matter, or is governed by his prejudices, which is very apt to be the case, his statements surely ought not to be received as evidence. It is very easy so to prepare ink, and this is constantly done, that it may appear to the eye to be of the age required. Microscopical and chemical tests may be competent to settle the question, but *these* should not be received as evidence, I think, unless the expert is able to show to the court and the jury the actual results of his examination, and also to explain his methods so that they can be fully understood. Surely, in matters involving such important questions, this is not too much to demand of the scientific witness, and he will as surely court such test if he have the least self-respect or regard for the honor of his vocation.

The investigations under this rule have been, heretofore, usually made by the eye, sometimes aided by optical instruments, which are like edge tools in the hands of unpracticed persons ; sometimes with chemical reagents, which in the present state of the science, can tell nothing in regard to the age of writing, but can tell sometimes as to the kind of ink. The practice has been, and still is, to call on both sides professional experts and others who have seen the party write, or are qualified in either of the ways described, to give an opinion upon the question at issue, and such opinions are to go to the jury as evidence which they are to weigh, say the court, and the value of which they must estimate as one end or the other of the scale shall preponderate.

Is not this the veriest farce and mockery of justice imaginable ? and would not drawing lots, as I have suggested, be far better, as it would be more expeditious and much less costly ? If we desire authority for this last method of deciding cases, we have such authority, much older than that of the Romans, which is so often quoted. “The lot causeth contentions to cease and parteth between the mighty.” Prov. 18 : 18. It will be seen that I object entirely

to those persons being called experts in any case who have not prepared themselves to give scientific testimony (in the full meaning of the word science, *e. g.*, knowledge certain and evident); not only in cases involving the validity of written documents, but wherever the nature of the case is susceptible of this class of evidence.

I use the word opinion in this discussion in its legitimate sense as used in the courts, *e. g.*, "an opinion is an idea or thought about which doubt can reasonably exist, as to which two persons can without absurdity think differently." Out of this system of admitting opinions as testimony in courts of justice, it seems to me, has grown the practice of heaping up such testimony in a certain class of cases, and also the efforts to impose upon the jury by numbers of witnesses, or by some fancied superiority of one witness over another, through the quackery of sounding names or titles, or of *ex cathedra* authority on the part of such witnesses. At a recent trial, a so-called expert was asked what offices he had held which gave him a right to such title. He replied, "I was president of the State Microscopical Society; I am president of the Academy of Sciences," and this statement was pleaded as good reason why his opinion should have great weight in deciding a question of handwriting.

In a recent case involving a large sum of money, in which the writer was engaged, the facts of the individuality of the handwriting, identity of ink and time, were all required as evidence. Here some ten witnesses, experts and others, were sworn on each side; some actually stating that they had seen the signature of the endorser (which alone gave the note any value), affixed to it by his own hand. This note purported to be nearly six years old. It was written with two different kinds of ink, and the writing, though having a somewhat faded appearance, still was perfectly legible, so that I had no difficulty in making a copy of every letter, and of getting one also by the photographic process. Upon making a micro-chemical examination of the ink, I found it was quite fresh, and moreover, that both kinds used were of such a nature as to grow old rapidly, as seen by the unaided eye, or under direct light, when viewed by aid of the microscope.

Here the experts and other witnesses swore as positively in favor of the sides on which they were employed, as is the usual fact in such cases, and the court remarking that "no court in the world

had to do so much guessing as this court," decided in favor of the genuineness of the note. The case was appealed, and a year elapsed before it came to trial. At this time, when the paper was again presented for examination, many letters and several whole words, even, had become totally illegible, thus confirming the conclusions to which I arrived on my first examination, that it could at that time have been but a few months or weeks old. The very astuteness of the skilled forgers in this case contributed to their defeat; they having selected, or more probably made, these inks themselves for the very purpose that they might rapidly grow old in order to appear so when presented for payment.

There is another point of view from which I desire to notice this case. It was carried in the first instance, as said the court, by guessing, or by the balancing of the opinions of experts and others, based upon the comparison of handwritings, under the rulings of the courts. My own testimony was not admissible in this respect, as I had never seen the endorser of the note write. I had in my possession hundreds of documents of his, consisting of checks, notes, deeds, etc., of which I had made most careful examinations, and yet I was not sufficiently acquainted with his handwriting to give an opinion in the case; while a mere laborer in his employ, who had once seen him sign his name when receipting a bill, was fully competent to testify, that is, to give an opinion in the case.

I should remark that the rule which precludes papers not in the case from being used for the purpose of comparison, is not binding in some of the states nor in the Federal courts.

There are certain methods of examination fairly coming under this head, not, however, contemplated by it or by any other rulings of the courts, which I should deem conclusive. One of these methods I have alluded to in connection with the specimens I have given in the engraving; the other is embodied in the study of the anatomy or skeleton, so to speak, of the handwriting. By the anatomy of the writing, I mean the principles on which the letters are formed. This not unfrequently consists of an undermarking or skeleton which may not appear to the eye, but which constitutes an absolute distinction in style. This can best be illustrated by an actual case.

Thus, an alleged forged agreement was brought into court, in which it was admitted that the body of the instrument was written by the party claiming under it, while the signature, it was con-

tended, was in the handwriting of one member of the firm, against which the claim was made. There were quite a number of witnesses who testified to their belief of the genuineness of the signature, one of them being a so-called expert, while as many from the same data gave contrary opinion. I found upon an examination of the document, that the anatomy of the handwriting of the signature was quite different from that of the alleged signer, while the signature itself and the writing in the body of the paper agreed in this respect, that is as to its principles of structure; one party writing in what I call the looped style, that is, making a looped letter whenever practicable, while the other, in every case where it was possible to do so, avoided any such form of letter.

To illustrate, one would make a capital *M* thus, by beginning the first stroke of the letter near the ruled line on the paper, forming a curve to the right, then carrying the pen upward toward the top of the letter, thence backward to the left, then downward across the first stroke, forming a loop in the process; next on reaching the line forming another loop by carrying the pen backwards to the left and upwards across the last line to the top, and then repeating the motion used in the first downward stroke in forming the last limb of the letter. Thus making the capital *M* with three loops, one at the bottom on the ruled line, and two at the top, and this was the fact in all this person's writing where it was possible to introduce a loop. In many cases these loops were made so narrow as scarcely to be noticed by the unaided eye, the two lines of ink uniting and forming a continuous line, yet under the magnifying glass the skeleton of the letters could be clearly seen, showing the principle on which they were constructed. When this party wrote with a pencil this looped structure of his letters could be clearly seen.

The other writer, the author of the document in question, would make the letter *M* thus, beginning it as the first described on the ruled line, then carrying the stroke upward to the top, from thence making the downward stroke directly on the right hand side of the first, forming an acute angle with this line, and so of the rest of the letter, which when finished showed three acute angles when the other showed three loops. This I will call the acute angular style, as it was characteristic of the whole document.

This contrast in the anatomy of the two styles of writing as surely shows that they were of different origin as would have been the fact in the old fable where the ass personates the lion by clothing himself in a lion's skin, could the observer having the two animals before him have looked through their skins to the skeletons beneath.

In a case in a commercial house where an embezzlement to a considerable amount was discovered, the alterations which were made in order to conceal the fraud were seen to be *fac similes* of the handwriting of one of the two clerks who kept the books. These alterations, however, might have been made by the other clerk, he imitating the handwriting of the first, in order, in case the fact was discovered, to clear himself by casting suspicion upon his fellow clerk. The question thus submitted without other testimony would seem to rest for its decision upon a comparison of the handwritings alone. This, as I have already shown, might work the greatest injustice in a case like the present, confounding the innocent with the guilty. The altered words and figures were to all appearance, in every respect like the handwriting of one of the parties, as before stated. Upon examining the principles upon which they were formed, a perfect correspondence was seen to exist here also, while upon a similar examination of the writing of the other clerk a very marked difference was observable, and much of this difference could only be seen through the aid of the microscope; hence I felt warranted in coming to the conclusion that the alterations were the work of the clerk whose handwriting they so closely resembled. It is possible, perhaps, to imitate a handwriting by the very means and in the very manner in which the original was executed. But this would, of course, necessitate the use of the microscope in the first place, and a good deal of after practice in order to its successful accomplishment. If it should occur in a given case and there should be no other means of detection, the expert would have no right to come to a conclusion, as it would in such a case be no better than guessing. I use the word "conclusion" in this paper in the sense of a necessary consequence, that is, to the mind of the expert. And under these conditions he might perhaps be allowed to state his conclusions to the jury, but not in this case or any other, without at the same time being called upon to give the grounds of such conclusions.

Another case which took place in an adjoining state, still further

illustrates the value of this method of examination, and also of that usually resorted to in such cases. This case involved the forgery of five separate notes, all purporting to be endorsed by one party, this endorsement alone giving them any value. This gentleman, the alleged endorser of the note, was quite aged, and wrote a very fine, tremulous hand; viewed by the unaided eye the imitation appeared almost perfect, and was sworn to by those persons whom the law in this state recognises as competent witnesses in such cases. On making a magnified copy of this signature, I found that the tremulous appearance of the letters was due to the fact that they were made up of a series of dashes standing at varying angles to each other, and further, that these strokes, thus enlarged, were precisely like those constituting the letters themselves in the body of the note which were acknowledged to have been written by the alleged forger of the signature. Upon the introduction of this testimony, the criminal withdrew the plea of not guilty and implored the mercy of the court.

In reviewing these cases it will be seen that any number of competent witnesses, and a majority of them I do not doubt, perfectly honest in their opinions or guesses, can be got to testify on either side of the question, well illustrating the value of this class of testimony.

"The teller in a bank is a competent witness when he has paid the checks of the party whose handwriting is involved in the question, provided he has not paid forged checks purporting to have been made by such party, this renders him incompetent." He would be competent, however, no matter how many such checks he may have paid, provided he has seen the party write once, and then only his name.

An expert may be called upon to testify as to which writing was made first in cases where the pen strokes are seen to cross each other. This is sometimes a most important matter, as upon such testimony the decision of a case may wholly depend.

In two recent cases, the possession of property to the amount of more than half a million dollars was determined by such a fact. From the investigation which I have made, I cannot doubt that in nearly all the cases of this kind, as well as where the age of documents has been decided, or the testimony in regard to this fact at all influenced, by their appearance alone, even when a magnifying glass has been used, that such decision has been based entirely upon

guessing. In one of the cases referred to above, the signatures were written with different inks, the letters in one crossing the other. The question to be decided was the order of sequence in the writing. To the unaided eye, and under the use of magnifying glasses also, one ink showed very clearly over the other, and had I been obliged to decide the question on such data alone, I could have come to but one conclusion, and this as it proved, would have been the wrong one.

I was able to demonstrate the facts in the case by wetting a piece of paper with a compound which acts as a solvent of ink, and then pressing this paper upon the writing in question, whereby a thin layer of ink was transferred to the prepared paper, at once settling the matter in dispute by showing which was the superposed ink.

As a result of my experience in this case, I was led to make a series of experiments with reference to determining this one fact, though, as in all such cases, others came up which helped to determine still others.

I took for the purpose of my experiment ten of the most common kinds of ink found in the market, and drew a series of lines, three in number, with each kind of ink, across a sheet of paper. This was followed by a similar series drawn diagonally across the first, thus forming a hundred points of crossing, and placing each kind of ink above and also under all the others. In thirty-seven cases out of the hundred, the eye, with or without the glass, saw the under ink as if it were on the surface; in forty cases nothing could be decided in this respect; the balance told the truth of the matter. By the other method, that is, by the use of the solvent, the true facts could be made plain in every one of these cases. This experiment, as will be seen, was made with ten kinds of ink more or less differing from each other in color and in chemical composition, and it certainly proves that all such testimony, as I have said, has been thus far no better than guess work.

But suppose the same kind of ink is used in a given case, here other methods of investigation must be resorted to.

The question may be determined as I was able to determine a similar one in the case of the *City of Chicago v. Gage et al.*, where the first strokes of the pen, forming channels as it were, and disturbing the size on the paper, allowing the ink in the crossing lines to flow out to some distance in these channels, thus causing there a double thickness of ink which was clearly visible to the naked eye.

There may be circumstances in these cases, preventing this outflow of ink ; or if it does take place, so mingling the ink in the crossing lines as to hinder the fact from being seen. Again, it might be determined by settling the question of age by chemical and other means applied to the writing itself.

If all these resources fail us we can then, under the rulings of the courts, resort to the usual method of forming an opinion through the process of guessing.

In a case where the validity of a note depended upon the fact whether the words and figures constituting the date of the endorsement were written at the time with the other words of the endorsement, I was able to decide the question by showing that they were not only more recent, but that they were written with a different kind of ink. The party swore that after having written the words constituting the assignment of the paper, he noticed that he had not dated it, and that he "then and there, with the same pen and with the same ink wrote the date over the other words." I was able to confirm my conclusions in this case, through experiments for ulterior purposes, by means of the photographic process. I had a photographic copy of the writing made in order to compare it with that on the inside of the instrument. The photograph not only copied the forms of the letters in this case, but it also took notice of the difference in color of the two inks, thus confirming the accuracy of my own deductions.

The photograph is able to distinguish shades of color which are inappreciable to the naked eye ; thus, where there is the least particle of yellow present in a color it will take notice of the fact by making the picture blacker, just in proportion as the yellow predominates, so that a very light yellow will take a deep black. So, any shade of green, or blue, or red, where there is an imperceptible amount of yellow, will print by the photographic process more or less black ; while either a red or blue, verging to a purple, will show more or less faint, as the case may be. Here is a method of investigation which may be made very useful in such cases, and which will give no uncertain answer. Indeed, its testimony may be said to amount to a demonstration. Greenleaf, in his work on Evidence, vol. 1, sec. 1, says, "none but mathematical truth is susceptible of that high degree of evidence called demonstration, which excludes all possibility of error." In spite of this dictum I have used the word demonstration several times in this paper, and as I hold that

scientific testimony which does not amount to a demonstration, should (in that class of cases susceptible of scientific accuracy), have little weight in a court of justice, I wish to bring it to a still further test. In a paper involving some thousand dollars, an alteration had been made, which, as was alleged, entirely changed the direction in which the property was intended to be bestowed by the maker of the paper. The alteration was admitted, but was sworn to as having been made by the original party immediately after writing the paper, he himself being dead at this present time, and the only living witness being the one so attesting.

This witness swore that the party "then and there," as in the case before quoted, "made the alteration at the same time and with the same pen and ink with which the other portion of the paper was written;" he added that "there was only one kind of ink in the room at the time." Upon examination I found that all of the paper, with the exception of that part where the alteration was made, was written with an ink composed of nut galls and sulphate of iron, while the other ink was made of aniline and Prussian blue. Does it not amount to a demonstration that the whole paper could not have been written with one and the same kind of ink? This is certainly in accordance with the received definition of the word, *e. g.*, demonstration, the exhibition of one truth as the consequence of another, &c.

The proof of the age of a document which is sought to be established by the appearance of the paper is, if possible, less reliable than by the comparison of the handwriting by the ordinary methods. I have repeatedly examined papers which have been made to appear old by various methods, such as washing with coffee, with tobacco-water, and by being carried in the pocket near the person, by being smoked and partially burnt, and in various other ways. I have in my possession a paper which has passed the ordeal of many examinations by experts and others, which purports to be two hundred years old, and to have been saved from the Boston fire. The handwriting is a perfect *fac simile* of that of Thomas Addington, the town clerk of Boston two hundred years ago, and yet this paper is not over two years old.

It will thus be seen that in my opinion, under the present rulings of the courts, there is no species of evidence less to be relied upon in regard to the genuineness of documents than that furnished by the (superficial) examination of the documents themselves, and

that this is wholly due to the methods of examination, and not in the least degree inherent in the nature of the subject itself. Such are the iron rules which govern these investigations, and so unwilling are scientific men in most instances to subject themselves to the ignorance and bigotry of unprincipled lawyers, that they avoid, so far as possible, having anything to do with such matters, and therefore, the name "expert" has got to mean anything other than what the term implies. Witnesses, if dishonest, will be governed by their interests; if honest and ignorant, by their prejudices; and thus, of course, both classes testify on the side which employs them, and as they can only give an opinion, which opinion at best is merely a guess, a trial merges itself into a thing of management, in which the most skilful strategist gains the victory. The jury are instructed "to weigh the evidence," and as they have no philosophers' scales in which mountains could be balanced against atoms of sense with which to perform the act, each party strives to make it appear that he has the greater weight of evidence on his side; hence the imposition of high-sounding titles; and, as I have noticed before, the introduction of all that class of management which strives to make the lesser reason appear the greater, and thus impose upon the jury. If the witness chances to be both intelligent and honest, the condition of things is no better; for, as I have shown before, he can only give a mere guess in any case under the existing methods in some of the courts.

I have said that the present unreliability of this class of testimony is not inherent in its nature, but under proper rulings, scientific witnesses (and these alone should be employed where the investigation is of a scientific nature), would be able to give absolutely reliable testimony in many cases, and where they were not able to do so they would state the fact, and thus remove all elements of guessing from this class of evidence. Further, the scientific witness should be allowed, indeed, should be obliged, as I have said before, to show and explain as far as possible the methods by which he arrives at his results. Thus, where a paper had been wet by a solution of tannic acid, for a fraudulent purpose, it was easy to show the fact by touching the yellowed paper with a solution of sulphate of iron, when the trick was at once made evident by the dark discoloration of the spot where the fluid was applied. The opinion of experts, and of all who saw this paper, was that the writing was very recent, on account of its fresh appearance. This

very freshness being the result of the washing with tannic acid. Thus also in a case of *tromp-l'oeil* in a French court; the ring or border of paste which had previously united the two papers could at once have been brought in view by washing the paper with a solution of iodine. It seems that in the French courts every manipulation or experiment necessary to elucidate the truth in the case, even to the destruction of the document in question, is allowed, the court as a matter of precaution, being first furnished with a certified copy of the same.

In the many cases of alleged fraudulent papers put in my hands for examination, I have rarely found any insurmountable difficulty in coming to a conclusion, such conclusion being based upon the principles which I have set down as requisite in my opinion, to be acted upon in all this class of testimony. As in cases involving blood examinations each case must be investigated by itself alone, as in almost every case new facts present themselves. Still general principles may be laid down so that with the aid of the microscope and other necessary instruments, and chemical re-agents, one may be prepared to solve this class of questions with almost unerring certainty, or at least to avoid coming to any wrong conclusions. Thus it will be seen that as I view the subject, this important class of testimony in all its phases, as now managed in the courts, so far from furthering the ends of justice, is more calculated to favor the wrongdoer; that there is no inherent necessity of such a condition of things, either in the nature of the subject itself, or in the present state of scientific knowledge; but that the fault is wholly due to the practice of the courts, which are governed in this respect, in most cases, by tradition and precedent rather than by logical reasoning or scientific deduction.

R. U. PIPER.

Chicago, Ills.

RECENT ENGLISH DECISIONS.

High Court of Justice ; Common Pleas Division.

BENT v. THE WAKEFIELD AND BARNSELY UNION BANK.

Where a reward is offered for information leading to the apprehension of a felon, a police constable, to whom the felon has voluntarily offered to surrender himself, is not entitled to the reward.

England v. Davidson, 11 A. & E. 856, commented upon.

THIS was an action tried before GROVE, J., at the Bristol Summer Assizes 1878. It was reserved for further consideration.

The facts of the case and the arguments on further consideration sufficiently appear in the judgment.

Arthur Charles, Q. C., for the plaintiff, cited *Smith v. Moore*, 1 C. B. 438; *England v. Davidson*, 11 A. & E. 856.

H. T. Cole, Q. C., and *Templer*, for the defendants, cited *Thatcher v. England*, 3 C. B. 254; *Lancaster v. Walsh*, 4 M. & W. 16; *Snowden on Constables*, p. 152; *Cowles v. Dunbar*, 2 C. & P. 565.

The opinion of the court was delivered by

GROVE, J.—This case was tried before me at Bristol at the last summer assize. It was an action for a reward of 200*l.* offered in a handbill, published by the defendants, in the following terms: “200*l.* Whereas, on the 26th of June last, William Glover, shoddy and mungo dealer, of Osset, absconded from Osset, after committing various forgeries on several manufacturing firms in the West Riding of Yorkshire; notice is hereby given that the above reward will be paid to any person or persons giving such information to Mr. William Airton, superintendent of police, Dewsbury, or to Mr. William Halls, superintendent of police, Wakefield, as will lead to the apprehension of the said William Glover. West Riding Police Office, Wakefield, 27th of July 1877.”

The plaintiff's case, on which my judgment must be founded, was shortly stated as follows: On the 30th of November 1877, a person presented himself at the police office, Exeter, and on the plaintiff, who was chief constable for Exeter, being sent for, the man, who was, in fact, Glover, said, according to the plaintiff's evidence, “You hold a warrant for me. I am wanted for forgery.” The plaintiff asked his name and what he was. He said, “You know already, and hold the warrant.” Some further conversation took place. The plaintiff thought the man was out of his mind, or had been drinking, and recommended him to go to an hotel. The plaintiff then left him in a private room, searched the “Police Gazette,” and found the name “William Glover,” wanted for forgery. He got him to take off his hat, and in his own words, “I satisfied myself after reading the ‘Police Gazette’ when he took his hat off.” The plaintiff then telegraphed to Mr. Airton, superintendent at Dewsbury, “Do you hold warrant for the apprehension of William Glover, for forgery?” and received a telegram

in return, "I still hold warrant for Glover, and should like him to be apprehended." Upon that the plaintiff apprehended and charged the man, who was ultimately convicted.

For the defendant, evidence was given to prove that Glover gave his name before the telegram was sent, and also that he was taken into custody before it was sent. I left these two questions to the jury, and they found that Glover was not in custody before the telegrams, but could not agree, and after being locked up were discharged as to the first question; counsel agreeing that they would accept the finding on the second question for the purposes of the case.

The point reserved and argued before me, on further consideration, was whether or not the plaintiff was entitled to the reward. For the plaintiff, it was argued that he was the person to be taken to have given the information leading to the apprehension, within the meaning of the handbill; for the defendants, that the criminal Glover had given the information himself; and, secondly, that on grounds of public policy, the plaintiff was not entitled to the reward.

I am of opinion that the defendants are entitled to judgment. It was not contended that the mere fact of being the person who first communicated with Airton, would be sufficient to entitle the plaintiff to success, supposing the information to have been given to the plaintiff by some one other than the criminal himself; indeed the very able and learned counsel for the plaintiff said, in answer to me (though I do not wish, and ought not to tie him to his admission), that if Glover had given information to Airton, Airton would have been entitled to the reward. I think he could hardly have avoided this admission. Airton and Halls, it seems to me, are persons mentioned as proper to be communicated with; but if the information had been given direct to those offering the reward, and had led to the apprehension, I should consider that sufficient. In *Lancaster v. Walsh*, where no person was named to receive the information, but the reward was to be given on application to the defendant, Mr. Baron PARKE says: "It seems to me that any communication to the constable, whose duty it was to search for the offender, was within the terms of the handbill, although there was no proof of a communication to the defendant himself." In the same case it is held by the same learned judge that "the party who first gave the information, and he alone, is to have the benefit;" and Mr. Baron ALDERSON says: "Information means the communication of material

facts for the first time." It appears to me that the first information given in the present case to a person authorized to act was that given by the criminal himself; and although he, on grounds of public policy, ought not to be entitled to the reward, still, where a constable may apprehend a criminal (Snowden on Constables, p. 152; Com. Dig. tit. *Justices of Peace*, B. 79), is the mere channel of communication, and only makes inquiries for the purpose of satisfying himself, he is not the person giving the information within the true meaning of the advertisement. The apprehension is not the consequence of the constable's information, but of the criminal's surrender of himself to justice. To use the words of Chief Justice TINDAL, in the case of *Thatcher v. England*, "The clue once found, the plaintiff, in apprehending, did no more than his ordinary duty."

It was argued that, in the case of *Thatcher v. England*, the first information was given by the criminal, and yet that the person who communicated that information was the party entitled; but there the communication by the criminal was not made to any one authorized to act in apprehending or procuring his apprehension, but to a person whom seemingly he considered a friend, for the purpose of borrowing money to enable him to go to London and dispose of the property stolen. The communication by the criminal there was not in the nature of information to be acted upon for the purpose of apprehension, and, had the person to whom it was made kept the secret, would not have led to his conviction. In that case it was also held, that though the first police constable to whom the communication was made by his activity and perseverance succeeded in tracing or recovering nearly the whole of the property, and in procuring evidence to convict the thief, he was not entitled to the reward.

The cases mainly relied on for the plaintiff were *England v. Davidson* and *Smith v. Moore*. The first of these cases bears more on the question of public policy than on the point to which I have hitherto adverted. It was there held, on demurrer, that the fact of the person giving the information being a constable did not necessarily disentitle him on the ground of want of consideration, it being his duty to discover and apprehend felons, or on grounds of public policy. In that case the averments in the declaration were general, viz: that the plaintiff did give such information as led to the conviction, and in the plea that the plaintiff was and is a constable of the district, and that it was his duty to give every

information which might lead to the conviction, and to apprehend him. The short judgment of the court, delivered by Lord DENMAN, is as follows: "I think there may be services which the constable is not bound to render, and which he may, therefore, make the ground of a contract. We should not hold a contract to be against the policy of the law unless the grounds for so deciding were very clear." All that that case decides is that a constable as such is not disentitled to a reward of this description, or necessarily disentitled as against public policy. In *Smith v. Moore* a police constable then temporarily suspended apprehended a burglar, who, after his apprehension voluntarily confessed. The constable was held entitled to the reward. There is in that case the obvious distinction from the present that the confession was made after the apprehension effected by the person claiming the reward, who, by his suspicions, and by apprehending on the strength of them, had already done much, probably enough, to earn it.

On the question of public policy I am bound by the case of *England v. Davidson*, so far as the judgment in that case extends, and although there may be some distinction as to this point between that case and the present, yet in deciding a case on the ground of public policy, the decision should be based on some broad principle, and one capable of general application. I am unable to see any general principle other than that argued in *England v. Davidson*, viz., that a constable is bound by his duty, the duty of his office, to seek for criminals, and to use his utmost efforts to bring them to justice. There are strong arguments of expediency touching the administration of justice and the interest of the state, why constables should not be allowed to receive rewards. The expectation of rewards would offer great temptation to delay an active search, by which delay the criminal might escape, or in a case like the present to delay taking into custody a criminal who gives himself up, so that the constable might appear to use exertions to procure complete information, and for that to claim the reward. There would also be a temptation, particularly to those constables in the detective service, to look to bribes or to seek promises of rewards from persons anxious to recover their property, and unless such were offered to be inert in their efforts. But although the judgment in *England v. Davidson* does not enter upon those questions, I must assume that they were present to the minds of the judges who decided that case. Whatever my own opinion may be, it seems to me that I

cannot without over-subtle refinement apply to this case any general principle of public policy which is not involved in that case. If that case is to be reviewed, it must be reviewed in a court of appeal.

The first point is sufficient to decide this case, and I give judgment for the defendants.

Notwithstanding the court in this case preferred to rest its decision upon the special and particular ground, that the plaintiff was not really the person who gave the information which led to the apprehension of the offender, rather than on the broad grounds of public policy, yet it is well settled, in America at least, that officers can not recover a reward offered, when they do only what their duty requires, or when acting solely under their official authority.

This is well illustrated by the case of *Pool v. Boston*, 5 Cush. 219 (1849). The city had offered a reward of \$2000 for "the detection and conviction of any incendiaries." The plaintiff, a city watchman, while in the performance of his duty as such, discovered a person setting fire to a building in his precinct, and on the watchman's complaint he was convicted thereof, and punished, but the plaintiff was held not entitled to the reward, on the ground that he had done no more than his duty, which was either to give notice to the mayor, or chief of police, or else make the complaint himself, and have the arrest made immediately, and if he chose to do the latter, he did not thereby entitle himself to the reward. It is true that in this case the reward was offered by the city, in whose service the plaintiff was, and to whom he owed his whole abilities, but this fact does not seem to have been thought material by the court.

The same principle was again applied by the same court in *Davies v. Burns*, 5 Allen 349 (1862); in which the proprietors of the Cunard line of steamers, offered a reward for information to the agent or officers of their ships, of goods smuggled or intended to be smuggled

thereupon. The plaintiff was a day-inspector of customs, and was not assigned to inspect a steamer which arrived in the night, but did so, and seized some goods intended to be smuggled, and the owners thereof were convicted on his testimony. He gave information to the defendants of all the facts and claimed the reward; but he was not allowed to recover, upon the broad ground of public policy, because he was acting as officer of the customs, and although not exactly on duty as such, at the moment, but rather a volunteer, he was still acting in his right as an officer, and could not otherwise have had any authority to interfere at all; and while so acting, it was his duty to detect and expose any violation of the revenue laws, without any other compensation than that which was attached to his office; and judgment was entered for the defendants.

The offer of a reward is only one mode of making a contract, and the same principles apply, as if an actual special contract had been made to pay officers extra for doing only their duty; and for which a fixed salary or fixed fees are established by law. In such cases the decisions are uniform in both countries, that the officer cannot recover the extra compensation.

Thus in *Stotesbury v. Smith*, 2 Burr. 924 (1760), the defendant promised a sheriff's bailiff who had arrested his friend in a civil action, to pay him six guineas, if he would accept the defendant as his bail; but although he accepted him as offered, he was not allowed to recover, because if the defendant was a responsible party, he was bound to accept him, without compensation; and if he was not responsible, he had no

right to accept him, and therefore he had violated his duty. This is a leading case. See also *Bridge v. Case*, Cro. Jac. 103.

Hatch v. Mann, 15 Wend. 45 (1835), is a very strong case on this point. There the defendant applied to a constable to arrest his debtor on civil process, which the officer at first declined to do, but upon assurances of being well paid for it, undertook the service, and went with the defendant to the man's house at 3 o'clock at night, and watched until daylight, when he succeeded in arresting him. *Held*, he was not entitled to recover anything beyond his regular legal fees fixed by statute, even though the service was somewhat extra in its character, reversing an opposite decision in 9 Wend. 262. See also *Smith v. Whilden*, 10 Barr 39 (1848); *Gillmore v. Lewis*, 12 Ohio 281; *Stamper v. Temple*, 6 Humph. 113; *Rea v. Smith*, 2 Handy 193; *Brown v. Godfrey*, 33 Vt. 120.

But there may be cases where a sheriff arrests persons outside of his jurisdiction, where he is entitled to the reward, as much as any private citizen: *Davis v. Munson*, 43 Vt. 676. See *Hayden v. Songer*, 56 Ind. 42.

So when the law makes it the duty of pilots to give all the aid and assistance in their power to any vessel appearing in distress on the coast, and subjects them to a fine for refusal or neglect so to do, a contract to pay a pilot \$500 extra for such duty is void. *Callaghan v. Hallet*, 1 Caines 104 (1803).

These and many other similar cases might well have been decided on grounds of public policy alone, and to avoid extortion which might be practised by officers, or persons in authority: but there is another ground, weaker, perhaps, but yet quite sufficient, on which they might rest, viz: want of consideration; for it is elementary law that a promise to pay a person for simply doing what he was already under a legal obligation to do, is invalid for lack of consideration.

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The promisor receives only that to which he was legally entitled without such promise; the promisee parts with nothing he was not bound to render. So that the same result is reached between private parties, and when considerations of public policy do not apply; or if so, with much diminished force. Therefore a contract by a party to a suit to pay a witness who has already been lawfully summoned, and is bound to attend for his legal fee, an additional compensation as an inducement or compensation for his time, is not binding in law: *Willis v. Peckham*, 4 J. B. Moore 300; 1 Brod. & Bing. 515; *Collins v. Godfrey*, 1 B. & Ad. 950; *Dodge v. Stiles*, 26 Conn. 463.

For similar reasons a contract to pay seamen an extra compensation for merely doing their ordinary duty, for which they shipped, and which is fully covered by their contract, is not binding upon the master or owners: *Harris v. Watson*, Peake 102 (1791); *Sulk v. Meysick*, 2 Camp. 317; 6 Esp. 129 (1809); *Bartlett v. Wyman*, 14 Johns. 260 (1817); *Harris v. Carter*, 3 El. & B. 559 (1854); *The Araminta*, 1 Spinks 224. But reasons of public policy may perhaps enter into this peculiar contract, and strengthen the force of the objection to its validity.

It is probably on this ground, in part at least, that it was long ago held that a promise by A. to pay B. for discharging C. from an unlawful arrest, is not binding, since B. was bound to discharge C. without any promise at all. See *Atkison v. Settree*, Willes 482 (1744); *Herring v. Dorell*, 8 Dowl. P. C. 604. And see *Dixon v. Adams*, Cro. Eliz. 538 (1596); *Preston v. Bacon*, 4 Conn. 471. And this suggests the much mooted question, in modern times, whether a promise by A. to pay B. for fulfilling his contract with C. is binding if B. does nothing more, in time or mode, than he was legally bound to C. to do by his contract with him. Of

course, if A. is interested in the fulfilment of the promise by B., or is in any way benefited by its performance, that would prove a sufficient consideration for his promise; of which *Scotson v. Pegg*, 6 H. & N. 295 (1861); is a well known instance. See also *Talman v. Brester*, 65 Barb. 369. *Shadwell v. Shadwell*, 9 C. B. N. S. 159 (1860), is rather closer. There the defendant wrote to the plaintiff, who was engaged to the defendant's niece, that he was glad to hear of his intended marriage,

and that he would pay him 150*l.* a year for life. The plaintiff subsequently married, and the contract was held binding, although it did not appear that the plaintiff had by reason of the promise incurred any more liabilities than he was previously under to the defendant's niece. *BYLES, J.*, however, dissented in a very able judgment. And see *Davenport v. First Cong. Society*, 33 Wis. 387. But we are drifting away from our starting point.

EDMUND H. BENNETT.

RECENT AMERICAN DECISIONS.

United States Circuit Court, Western District of Pennsylvania.

TAYLOR ET AL. v. ROCKEFELLER ET AL.

A petition for the removal of a suit in equity to the United States Circuit Court, with accompanying bond, was filed in a state court during a term in which the bill was filed, but subsequently to the filing of the answer and the appointment by the latter court of a receiver. *Held*, that the petition was filed in time under the Act of Congress of 3d March 1875, requiring the filing to be made "before or at the term at which the cause could be first tried, and before the trial thereof."

No order or allowance of the state court for a removal of the cause is necessary under the Act of 3d March 1875. Under that Act, upon the filing of a proper petition and bond, in due season, the suit is withdrawn from the jurisdiction of the state court, provided the petition and record exhibit a case properly removable.

The jurisdiction of the state court is not ousted unless the petition and record show a case of which the United States court has jurisdiction; but the judgment of the state court to that effect is not binding upon the United States court; and if the latter court holds that the cause has been properly removed, a contrary decision by the state court has no effect.

Any cause which might have been commenced in the Circuit Court, either because of its subject-matter or the citizenship of the parties, may be removed from a state court into the federal one.

Quære, whether the federal courts have jurisdiction of a cause in which some of the indispensable parties on either side are citizens of the same state as that of some, but not all, of the indispensable parties on the other side.

They have not, "if the rule of construction applied to the Judiciary Act of 1789, and the Acts of 1866 and 1867, is applicable to the later Act of 3d March 1875. But the later act, for the first time, adopts the language of the constitution, and seems to have been intended to confer on the Circuit Court all the jurisdiction which, under the constitution, it was in the power of Congress to confer." *Per STRONG, J.*

Semble, that, upon a legitimate construction of the constitution, the federal jurisdiction in such a case exists.

Seemle, that, prior to the Act of 3d March 1875, no removal could be had unless each of the plaintiffs could have sued each of the defendants in the federal court; though the ruling did not apply except as to indispensable parties, and perhaps not where distinct interests were represented by distinct parties, of whom some could sue, or were liable to be sued, in the federal courts.

But under that act the power of removal is enlarged, and may be enjoyed where in a suit there are several controversies of which one is wholly between citizens of different states, and can be fully determined as between them. And this is true though others of the same party with the petitioners for removal, actually interested in other controversies embraced in the same suit, could not, on account of having the same citizenship with some of the other party, have themselves removed the suit.

Upon the question of citizenship under the act, the court looks to the citizenship of the trustee, not of the *cestui que trust*.

Where the plaintiffs, who were all citizens of a different state from that of the defendants, trustees, in a suit against the latter, joined their *cestuis que trustent* as co-defendants, the jurisdiction of the United States court is not affected by the citizenship of any of the *cestuis que trustent*.

Seemle, that the "controversy" mentioned in the Act of 3d March 1875, between the petitioners and the opposite party, need not be the main controversy in the case.

A controversy wholly between citizens of different states, fully determinable as between them, entitles either of such parties to removal, though not fully determinable as between the remaining parties.

The Circuit Court, upon such removal, obtains jurisdiction over the whole cause, the remaining controversies therein being treated as incidental to that which authorized the removal.

MOTION to remand case to state court.

A bill in equity was filed in the Court of Common Pleas of Butler county, Pennsylvania, on February 8th 1878, by H. L. Taylor, John Pitcairn, Jr., and John Satterfield, against William J. Warden, Charles Lockart, William Frew, The Atlantic Refining Co., Charles Pratt, Henry P. Rogers, H. A. Pratt, John D. Rockefeller, and Henry M. Flagler, alleging that the plaintiffs, with one Vandegrift and one Foreman, sold an undivided interest in their oil-producing properties to, and entered into a partnership with, the defendants (without mentioning their names); that the object of the partnership was the purchase and operation of oil-producing territory, and the production and sale of petroleum in its crude state. It further alleged that at the time of entering into the partnership, a written contract (which was made part of the bill) was executed between certain trustees, named Taylor and Bushnell, of the first part, the plaintiffs, and Foreman and Vandegrift, of the second part, and the defendants, Flagler and Rockefeller, of the third part, stating the terms under which the title to the lands

should be purchased, held and disposed of, and fixing a method of dissolving, and limitation to, the partnership. It further alleged, that the defendants other than Rockefeller and Flagler, were parties to a conveyance of land to the trustees named in the foregoing contract; that they had assented to it in writing, and declared that their conveyance was made for the purposes set forth in it.

The contract itself showed the parties to it to be Taylor and Bushnell, trustees, parties of the first part, who were to hold the lands conveyed to them, to operate, control and sell them for the sole and exclusive benefit of Taylor, Vandegrift, Pitcairn, Foreman and Satterfield, parties of the second part, and Rockefeller and Flagler, of the third part. It stipulated that in case profits were divided, they, together with all proceeds of sale, should be divided monthly, or oftener if the executive committee should so decide, and paid one-half to Taylor, for the parties of the second part, and the other half to Flagler, for the parties of the third part. None of the defendants, other than Rockefeller and Flagler, were parties to the contract at the time of its execution.

The bill then alleged a breach of the agreement on the part of the defendants, and prayed (1) that the partnership under the agreement should be dissolved; (2) for an account and payment in accordance with it; (3) for discovery in aid of the account, and (4) for an order restraining the defendants from disposing of, or improperly interfering with, the property of the partnership, *pendente lite*.

The case was docketed to March term 1878. On February 21st 1878, an answer was filed by the defendants, denying the material allegations of the bill; on the same day the case was argued upon a motion for the appointment of a receiver, and on the 25th of February a decree was entered, appointing a receiver.

On March 5th 1878, a petition was presented and filed by Rockefeller and Flagler, two of the defendants, setting forth that they were citizens of Ohio, that of the other defendants, Warden, Lockart, Frew, and the Atlantic Refining Co., were citizens of Pennsylvania, and that the Pratts and Rogers, the other defendants, were citizens of New York. That of the complainants, Taylor was a citizen of New York, and the others of Pennsylvania; that the citizenship existed as stated, at the time of the commencement of the litigation, and continued down to the time of the filing of the petition; that the controversy was of a civil nature,

in equity, and that the sum in dispute exceeded, exclusive of costs, the sum of \$500. The petition further alleged that the controversy was wholly between citizens of different states—the complainants, citizens of New York and Pennsylvania, and the petitioners defendants, citizens of Ohio—and that it was brought for the purpose of restraining and enjoining the petitioners. That although Warden and others were joined as defendants in the bill; they were only nominally parties, and that the controversy was capable of a final determination between the complainants and the petitioning defendants alone. It further set forth that the petition was filed before the term at which the cause could have been first legally tried, and that a bond had been filed with good and sufficient surety conditioned as required by law. The petition prayed that the court should proceed no further in the case, but should order its removal and certify the record to the Circuit Court of the United States, for the Western District of Pennsylvania.

The court (McJUNKIN, P. J.), after argument, filed an elaborate opinion, in which, after conceding that the application for removal was made in time, and that the bond offered was sufficient, he refused to order the removal of the cause, on the ground that from the record, which was the only legal evidence of the facts, it could not be discovered that the controversy was one that could be wholly decided and determined between the complainants and the petitioning defendants without the presence of the other defendants, and that, therefore, notwithstanding the difference of citizenship, the case did not come within the terms of federal legislation in regard to the removal of causes from the state courts, even of the Statute of 3d March 1875. (See 25 Pitts. L. J. 137.)

The petitioners, Rockefeller and Flagler, thereupon filed a certified copy of the record in this court. The complainants now move to remand the case to the Court of Common Pleas of Butler county.

George Shiras, Jr., M. W. Acheson and John M. Miller, for the motion.

Rufus P. Ranney, McJunkin & Campbell, Hampton & Dalzell, Robert Woods and D. T. Watson, contra.

The opinion of the court was delivered by
STRONG, J.—Three reasons are assigned in support of the motion

to remand this case to the state court. They are as follows: First, that the application to remove the case into this court was not made in time; secondly, that if the application was in time the record discloses that the state court, in the due and orderly exercise of its own jurisdiction, has adjudged that the record and petition did not exhibit a case proper for removal under the Acts of Congress, and has refused to part with its jurisdiction; and thirdly, that the record clearly shows this court can have no jurisdiction of the case.

Of the first reason little need be said. The Act of Congress of 3d March 1875, has greatly enlarged the jurisdiction of the Circuit Courts of the United States, and enlarged correspondingly the right of removal of civil suits from the state courts. The second section of the act enacts as follows: "That any suit of a civil nature, at law, or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state, claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, either party may remove said suit into the Circuit Court of the United States for the proper district. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined, as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy, may remove said suit into the Circuit Court of the United States for the proper district."

The third section prescribes the time when such removal may be made, and the manner in which it may be effected. It enacts that either party, or any one or more of the plaintiffs or defendants entitled to remove the suit, may make and file in the suit in the state court a petition for the removal before or at the term at which the cause could be first tried, and before the trial thereof, together with a bond with surety, &c. It is then made the duty of the state court to accept the petition and bond, and proceed no further in the suit. The petition and bond must be filed "before or at the term at which

the cause could be first tried, and before the trial thereof." In this case the bill was brought to March term 1878, of the state court. It was filed on the 8th of February 1878; a motion was instantly made for a receiver, and the 20th of February was assigned for hearing the motion. On the 18th of February the defendants entered their appearance, and moved to postpone hearing of the motion for a receiver until the 27th. This motion the court denied, but postponed the hearing one day. On the 21st of February the defendants filed a joint answer under oath, denying most of the material averments of the bill, together with affidavits. On February 25th the court appointed a receiver, and on the 5th of March 1878, the petition for removal of the suit into this court was filed together with the required bond. They were filed before the first term of the Common Pleas, subsequent to filing the bill, commenced. This recital of the facts, as they appear by the record, without more, is sufficient to show that the application for removal was made in due time.

The second reason advanced for remanding the case is equally without merit. If a proper petition and bond were filed in due season, as we have seen they were, and if the petition and record exhibited a case which the petitioners had a right to remove, it was not in the power of the state court to deny the right by any judgment it could give. The Act of Congress declares that after the petition and bond are filed, the state court shall proceed no further in the suit. The petition is filed in the suit. It thus is made part of the record, and, by the act of filing, the suit is withdrawn from the jurisdiction of the state court. It may be admitted that when the petition, read in connection with the other parts of the record, does not show a case of which the Circuit Court has jurisdiction, the jurisdiction of the state court is not ousted. In such a case that court may proceed. It may, therefore, examine the petition and record, but its judgment upon the question whether a proper case appears for removal is not conclusive upon the Circuit Court. It is to be observed that no order of the state court for a removal is necessary; certainly none, since the act of 1875. Nor is any allowance required. The allowance is made by the statute. Hence when the petition and record exhibit a case for removal, coming within the statute, all jurisdiction of the state court terminates. It has even been said every subsequent exercise of jurisdiction by that court is "*coram non judice*," null and void. Such was the language

of the Supreme Court in *Gordon v. Longert*, 16 Pet. 97, and the declaration has been repeated in other courts. This would seem to follow from the fact that subsequent action by the state court is expressly prohibited by the Act of Congress. But whether the declaration was strictly accurate when it was made, or not; whether subsequent exercise of jurisdiction by the state court was not void, but merely erroneous, it is unimportant now to consider; for plainly since, by the Act of 1875, the power of removal and the jurisdiction of the federal court is made independent of any action or non-action of the state court upon the application. The 5th section of the act requires the Circuit Court to dismiss a suit which has been removed, or remand it whenever it shall appear to its satisfaction that it does not involve a dispute or controversy properly within the jurisdiction of the Circuit Court. A decision of the state court, therefore, that the cause sought to be removed is one of which the Circuit Court has jurisdiction, can have no effect. It cannot force jurisdiction upon the Circuit Court, nor can it deny jurisdiction to it. And further the 7th section empowers the Circuit Court, to which any cause shall be removable under the act, to issue a writ of certiorari to the state court, commanding said court to make return of the record in any such cause, removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of the act for the removal of the same, and enforce said writ according to law. Surely it would be no sufficient return to such a writ that the state court had decided the case was not one which could be removed, or had decided that the Circuit Court had no jurisdiction. So also it may be inferred from another provision of the act that no action of the state court can prevent or hinder the removal. A severe penalty is imposed upon the clerk of the state court who shall refuse to any one or more of the parties applying to remove a cause, a copy of the record therein, after tender of the legal fees for such copy. The copy must be furnished for filing in the Circuit Court to any party applying for removal, without reference to any action the state court may have taken.

For these reasons we think the refusal of the Court of Common Pleas to allow the removal of the case into this court is immaterial.

The third reason urged in support of the motion to remand is the most important one. If it be true indeed that the case is one of which this court has no jurisdiction, it is our duty to remand it to the court from which it has been removed. Whether we have juris-

diction or not depends both upon the citizenship of the parties and the controversy involved. What the citizenship is must be determined from the bill filed by the plaintiffs; and to the bill with its exhibit, the answer and the petition for removal, alone, can we look for the controversy between the parties, so far as it bears upon our jurisdiction. Taylor, one of the plaintiffs, is a citizen of New York, and his co-plaintiffs are citizens of Pennsylvania. Rockefeller and Flagler, the petitioners for removal, are two of the defendants, and they are both citizens of Ohio. The other defendants sued with Rockefeller and Flagler, are citizens either of Pennsylvania or of New York. The petitioners are therefore citizens of a different state from those of which the plaintiffs are citizens, though some of the plaintiffs and some of the defendants are citizens of the same state, viz., Pennsylvania. Such being the citizenship, it may be admitted that, as the law was before the enactment of the Act of 1875, the petitioners would have had no right to remove the case into the Circuit Court, and that court would have had no jurisdiction, because each of the plaintiffs was not capable of suing each of the defendants in a federal court. So it was ruled in *Strawbridge v. Curtis*, 3 Cranch 267, when the 12th section of the Judiciary Act of 1789 was under consideration, and this has been the constant construction of that act. Similar rulings have been made with reference to the acts of 1866 and 1867; case of the *Sewing Machine Companies*, 18 Wall. 553; *Knapp v. Railroad Co.*, 20 Wall. 122. Such was the general rule. It was not, however, of universal application. Even in *Strawbridge v. Curtis*, the court declined giving an opinion of a case where several parties represent several distinct interests, and some of the parties are, and others are not competent to sue, or liable to be sued in the courts of the United States. And the rule has often been held not to apply to merely formal parties. Thus in *Wood v. Davis*, 18 How. 468, it was said by the Supreme Court: "It has been repeatedly decided by this court, that formal parties, or nominal parties, or parties without interest united with the real parties to the litigation, cannot oust the federal courts of jurisdiction, if the citizenship or character of the real parties be such as to confer it." The court has gone much farther. In *Shields v. Barrow*, 17 How. 139, speaking of parties to a bill in equity, they were described as—1st, formal parties; 2d, necessary parties; and 3d, "persons who not only have an interest in the controversy, but an interest of such a

nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." Such are indispensable parties. And subsequent decisions held that it is only when an indispensable party defendant was a citizen of the same state with the plaintiff that the jurisdiction of the federal courts was defeated. *Ober v. Gallagher*, 93 U. S. 204.

But, whatever may have been the doctrine held prior to the Act of Congress of 1875, that Act has introduced great changes of the law. The 1st section extends the jurisdiction of the Circuit Court nearly, if not quite as far as the 2d section of the 3d article of the constitution authorizes, alike in regard to the subject-matter of suits, and to the citizenship of the parties. It adopts the words of the constitution. The 2d section relates to the removal of suits from state courts into United States Circuit Courts, and it follows the language of the 1st section. Hence, any cause which might have been commenced in the Circuit Court, either because of its subject-matter or the citizenship of the parties, may be removed from a state court into the federal one. The question always is whether, on account of the citizenship of the parties or the subject of the controversy, the federal court has jurisdiction.

Whether since the Act of 1875, the right of removal extends to all cases in which some of the necessary or indispensable defendants are citizens of the same state with the plaintiffs or some of them is no doubt a very important question, not yet decided. It does not, if the rule of construction applied to the Judiciary Act of 1789, and the Acts of 1866 and 1867, is applicable to the later act. But the later act, for the first time, adopts the language of the constitution, and seems to have been intended to confer on the circuit courts all the jurisdiction which, under the constitution, it was in the power of Congress to bestow. Certainly the case mentioned would be a controversy between citizens of different states, and the reasons which induced the framers of the constitution to give jurisdiction to the federal courts of controversies between citizens of different states apply as strongly to it as they do to a case in which all the defendants are citizens of a state other than that in which the plaintiffs are citizens; and if that instrument is to be construed so as to carry out its intent, it would seem the question should be answered in the affirmative. However, that may be, it is certain

the Act of 1875 confers a right to remove cases which could not have been removed under any former act. It expressly declares that when in any suit mentioned in the second section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit into the Circuit Court. It is not where the controversy, or even the main controversy is between such citizens. The meaning of the clause is not obscure. In many suits there are numerous subjects of controversy, in some of which one or more of the defendants is actually interested, and other defendants are not. The right of removal is given where any one of those controversies is wholly between citizens of different states, and can be fully determined as between them, though there may be other defendants actually interested in other controversies embraced in the suit. The clause, "a controversy which can fully be determined as between them," read in connection with the other words, "actually interested in such controversy," implies that there may be other parties to the suit, and even necessary parties, who are not entitled to remove it. Such other parties must be indispensable to a determination of that controversy which is wholly between the citizens of different states, or their being parties to the action is no obstacle to a removal of the case into the Circuit Court.

If this is a correct construction of the Act of Congress, the case in hand is free from difficulty. The petition of Rockefeller and Flagler for removal, asserts that the controversy is wholly between them and the plaintiffs, and that as between them it can be fully determined. The motion to remand traverses no fact set out in the petition. It simply presents the question whether the facts asserted in the record show that under the Act of Congress the case was improperly removed, and that this court has no jurisdiction of it. The fifth section of the act provides that, if at any time it shall appear that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court, that court shall proceed no further therein, but shall remand it to the court from which it was removed. Looking then to the bill and answer, do they involve such a controversy? We cannot doubt that they do.

The bill, with its exhibit, made a part of the bill, charges that the plaintiffs, together with one Vandergift, and one Foreman, sold

an undivided half interest in their oil producing properties to the defendants (not naming them), and entered into a partnership with the defendants (not naming them), having for its object the purchase and operation of oil producing territory, and the production and sale of crude petroleum. It further charges that, at the time of entering into the contract of partnership, a written contract was executed between certain trustees of the first part, the plaintiffs, and Vandergift and Foreman, of the second part, and Rockefeller and Flagler of the third part, confirmed by the other parties defendant, providing for the manner in which the title to the lands and property of the partnership should be acquired, held and disposed of, and fixing a limitation and method of dissolution of the partnership. A copy of this agreement is annexed to the bill, and made a part of it. From the whole tenor of the bill, it is evident that agreement is what is called the contract of partnership. But on reference to it, its purpose was not to create or evidence a partnership. It is a mere declaration of trust. The parties to it are Taylor and Bushnell, two trustees, of the first part, whose duty is to hold the lands conveyed to them, and to manage them, to operate, control and sell them for the sole and exclusive benefit of Taylor, Vandegrift, Foreman, Pitcairn and Satterfield, of the second part, and Rockefeller and Flagler, of the third part. There are no other parties to the agreement. The parties mentioned as of the third part are petitioners for the removal of the case. They are the only defendants named in the contract. The other defendants, it is true, appear to have joined in one of the conveyances of land conveyed to the trustees, and by a separate instrument they expressed assent to the agreement, and declared that their conveyance was made for the purpose set forth in it. But they entered into no covenants, and assumed no obligations to the plaintiffs. Looking more minutely to the contract, it appears that Taylor and Bushnell, the trustees, and parties of the first part, were constituted managers of the property and the interests of the trust, for a compensation to be fixed. All the other parties were at best mere *cestui que trustent*, and it was stipulated that in case profits were divided, they, together with all proceeds of sale, should be divided monthly, or oftener if the executive committee should so decide, and paid one-half to Taylor for the second party, and the other half to Henry M. Flagler for the third party. Beyond doubt, therefore, Rockefeller and Flagler are the main defendants in this

suit. There are no other indispensable defendants. If those who have not petitioned for a removal of the suit into this court have any interest at all in it, it is because Rockefeller and Flagler, the petitioners, are their trustees; a matter in which the plaintiffs have no interest. Conceding that those other defendants are *cestuis que trustent* of Rockefeller and Flagler, which does not clearly appear, they are not necessary parties to the bill. They are represented by their trustees: *Kerrison, Assignee, v. Stewart*, 93 U. S. R. 159. And the fact that they have been made parties by the plaintiffs is, under the Act of 1875, no obstacle to the removal of the case into the federal court: 2 Wood's Cir. C. Rep. 126; *Osgood v. Railroad Co.*, 6 Bis. 330; *Turner v. Railroad Co.*, Dillon on Removal of Causes 34, note. The case, therefore, plainly involves a controversy which is wholly between the plaintiffs and Rockefeller, and which can be fully determined as between them. If there are other controversies, in which the other defendants are interested, they are merely incidental; they are not the main controversy. The real controversy, as appears on the face of the bill, independent of the answer and the petition for removal, is between the plaintiffs and Rockefeller and Flagler, the second and third parties to the trust agreement. This is true whether the third parties are solely interested in one-half of the trust property, or whether they are trustees of the other defendants.

Indeed, according to the literal reading of the statute (a reading quite in harmony with the constitution), the right of removal, and the jurisdiction of this court exists, though the controversy between the plaintiffs and the defendants who are petitioners for the removal be not the main controversy in the case. It is enough if there be a controversy wholly between citizens of different states which can be fully determined as between them, though it may not be fully determined as between the plaintiffs and the other defendants. The phrase "as between them" is significant. And there is no necessary embarrassment attending such a removal. The entire suit is removed because of the controversy it involves between citizens of different states, and the Circuit Court, having thus obtained jurisdiction, is competent to determine all the controversies involved between the plaintiffs and the other defendants. The other questions are regarded as incidental. This is in accordance with the acknowledged practice, and with the adjudications. It has even been ruled that supplementary, auxiliary, or dependent proceedings,

though commenced by original bill, and involving only controversies between citizens of the same state, will be entertained in the federal courts, when necessary to a complete determination of all the matters growing out of the controversy in those courts, between citizens of different states. *Jones v. Andrews*, 10 Wall. 833, and cases in note.

But in this case it is unnecessary to invoke such decisions. The case, as exhibited by the bill of the plaintiffs, is one of property equitably held in common, to be managed and divided as stipulated in an agreement, and the object of the suit is to terminate the trust declared, and to have the property sold and divided according to the equities of the parties interested. The agreement itself provides how the division shall be made. Any rights to the profits, or proceeds of sale, not belonging to the second or third parties, that is not belonging to the plaintiffs, or Rockefeller and Flagler, are only incidental. The entire property described in the agreement, together with all rights to it, and all duties in relation to it, and all duties in relation to its management, belongs to the plaintiffs and Rockefeller and Flagler. If the other defendants have claims against the latter, they are outside of the real controversy, and claims in which the plaintiffs have no interest.

We think, therefore, the case was properly removed into this court, and the motion to remand it to the state court is denied.

McKENNAN, J., concurred.

Since the last edition of Judge DIL-
LON's pamphlet, on the Removal of
Causes, appeared in 1877, several im-
portant decisions have been rendered,
in cases that arose under the provisions
of the Act of March 3d 1875. It is
proposed to consider these cases, as
well as the questions decided in the
principal case, with reference, first, to
the effect of the decisions of the state
court on the removal of the cause;
secondly, the effect of the Act of 3d
March 1875 upon prior legislation;
thirdly, the time within which the re-
moval may be made; and finally, the
parties to the removal.

I. It was held in the principal case,
that the jurisdiction of the state court is
not ousted, unless the record and peti-

tion show a case of which the United
States court has jurisdiction; but the
judgment of the state court to that
effect is not binding upon the United
States court; and if the latter court
holds that the cause has been improp-
erly removed, a contrary decision by
the state court has no effect. The
Court of Common Pleas No. 3, of Phil-
adelphia county, in *Dunham v. Baird*,
1 W. N. C. 493, held that the cause
could not be removed to the United
States court, on account of the supposed
want of proper citizenship of the parties.
The cause was subsequently removed to
the Circuit Court for the Eastern Dis-
trict of Pennsylvania, and a motion to
remand was denied by the court, Mc-
KENNAN, J., holding that no action by

the state court was required by the Act of 3d March 1875, upon the petition or bond. It was for the United States courts to determine the sufficiency of the latter, when questioned. CADWALLADER, J., concurred. The same court, in *McMurdy v. Life Ins. Co.*, 4 W. N. C. 18, held, in remanding the cause, that the plaintiff was not guilty of laches, in not opposing the removal before the state court, since that court had no longer jurisdiction, after the petition and bond were filed, to decide the right of removal, that being wholly within the jurisdiction of this court. And, again, in *Arthur's Adm'r v. N. E. M. Life Ins. Co.*, 6 W. N. C. 403, McKENNAN, J., held that when the petition and bond were *rightly* filed, the jurisdiction of the state court *ipso facto* ceased, provided the removal is perfected by the filing of the copy of the record in the federal court. In *Ex parte Grimball*, 8 Cent. L. J. 151, the Supreme Court of Alabama held it to be the duty of the state court to examine the petition for removal, in order to ascertain whether the cause may be properly removed.

II. The only changes introduced by the part of the second section of the Act of 1875, which refers to a "controversy between citizens of different states," are, that either the plaintiff or defendant may remove the cause, and that it is no longer necessary that either party should be a citizen of the state in which the suit is brought; but it still remains necessary that the state citizenship of each individual plaintiff should be different from the state citizenship of each individual defendant, to authorize a removal under this section: *Petersen v. Chapman*, 13 Blatch. 395 (Circuit Court for the Northern District of New York). In *Warner v. The Railroad Co.*, 13 Blatchf. 231, the same court decided that, prior to the Act of 3d March 1875, a suit in a state court, which fell within the description of removable

causes, might be removed, although it could not originally have been brought in the federal court; and this principle is not changed by the fifth section of the Act of 3d March 1875, which provides for the remanding or dismissal of causes, by the federal courts, not really or substantially involving a controversy within their jurisdiction. In *McMurdy v. Life Ins. Co.*, *supra*, the bond filed was conditional for the filing of a copy of the record of the proceedings in the state court upon the first day of the succeeding term of the Circuit Court, in the latter court, but did not provide, as is required by the third section of the Act of 1875, for the payment of costs, if the suit should be held, by the Circuit Court, to have been improperly removed. The court held this to be a fatal defect, and remanded the cause, *inter alia*, on the ground that the requirements as to the nature of the bond extended to all cases mentioned in the second section, and to that extent, at least, repealed all prior acts upon this subject. In *Cooke v. Ford et al.*, 16 Am. Law Reg. N. S. 417, it was held by the Circuit Court of Kentucky that the Act of 3d March 1875, does not entirely repeal § 639, Rev. Stat., relating to the removal of causes. The third subdivision of § 639, Rev. Stat., is not inconsistent with the Act of 1875, and is not repealed by it, and the court laid down the three following rules:—

1. No citizen of a state in which a suit is brought can remove it, except on petition filed, before or at the term, at which the cause could first be tried.

2. Where a suit is between citizens of different states, neither of whom is a citizen of the state in which the suit is brought, neither party can remove it, except on petition, before or at the term, at which the cause could first be tried; and

3. When the suit is between a citizen of the state in which it is brought and a citizen of another state, the latter may

remove it, by petition filed at any time before trial or final hearing, upon making an affidavit of prejudice or local influence, which will prevent a fair trial. The repeal of statutes is not favored, and will not be allowed by the court, unless the two are antagonistic and incapable of being reconciled. In the *New Jersey Zinc Co. v. Trotter*, 17 Am. Law Reg. N. S. 376, it was held by NIXON, J., in the District Court of New Jersey, that the second and third subdivisions of § 639, Rev. Stat., are not repealed by the Act of 1875. This was a suit brought in the state court by a corporation of New Jersey against three defendants, two being citizens of New Jersey, and one a resident of New York. The latter answered to the merits of the case, and removed the cause to the United States court. On motion to remand, it was held that the controversy could be determined without the presence of the other two defendants, and that the controversy as to them was removable under the second subdivision of § 639, Rev. Stat., and the motion was refused.

III. In *Huddy v. Havens*, 3 W. N. C. 432, Judge HARE held, in the Court of Common Pleas No. 2, of Philadelphia county, the "next term" under the Act of 3d March 1875, to be the next term at which the case could be *legally* tried, but not actually. If, owing to a crowded docket, the case could not be reached till the third term after it was at issue, a petition to remove it then is too late. This cause was removed to the Circuit Court for the Eastern District of Pennsylvania. The court remanded it, and held, following the decision of Judge HARE, and that of Judge DILLON, to the same effect, that the words "before" or "at" the term at which the cause could be first tried, meant the term at which the cause was first triable on its merits; and the court followed the record alone, and took no testimony on the subject. But what is the term at

which the cause could be first tried? Does the language of the statute refer to the first term *during the whole of which the cause was triable*, or to the first term during any portion of which the cause was in that condition? Suppose the cause is put at issue on the last day of the state term, is either party precluded from removing the cause on account of the accidental shortness of time left for making and filing his petition and bond? This seems unreasonable, and the better view would appear to be that the term at which the cause could be first tried refers to a whole term of the state court, during which it is in the option of either party to remove the cause. In *Dunham v. Baird*, *supra*, the cause had been at issue and triable when the Act of 3d March 1875 was passed, nearly a year. There were four yearly terms in the state court in which the action was pending, the return-day of that term, during which the Act of Congress was passed, being the 1st of March. The next term began on the first Monday of June, and the petition was not filed till the twelfth of that month. It was argued that the time for removal had elapsed with the March term. As the cause was at issue prior to that term, that was the term at which the cause could be first tried. The removal should have been made during the March term (*i. e.*, during the months of March, April or May). But the state court, though refusing to assent to the removal, expressly negatived the argument. "The return-day," said LUDLOW, P. J., "of the March term was 1st March, a divided term is not judicially cognizable; the March term had passed in contemplation of law on 3d March," (the day on which the act was passed). So, on the same page, that judge said, "The act was only passed on 3d March 1875, during the term preceding this. This was, therefore, the first term succeeding the Act of Congress at which the cause could be tried."

And the same view was taken in this case by McKENNA, Circuit Judge (2 W. N. C. 52). It will be remembered that the language of the act provides for the removal "before or at the term at which the said cause could be first tried, and before the trial thereof;" and it is difficult to see how this definition is fulfilled if predicated of a term which is one, not at which, but during only a part of which "said cause could be first tried." It would seem, therefore, both on reason and authority, that the removal term is the term succeeding that during which the cause is put at issue.

In *Gurnee v. City of Brunswick*, 1 Hughes 270, WAITE, C. J., held that "the application to remove must be made at or before the first term at which the cause may be tried, i. e., when the cause is ready for trial, although the court and parties may not be ready to try it." The same case further decided that, as an appeal from the board of supervisors, under the laws and practice in Virginia, to a county court, is triable *without pleadings* at the first term of the court after the appeal is taken, an application for removal must then be made at that term. The word "term" is a term occurring after the passage of this act: *Bank v. Wheeler*, 13 Blatch. 218; *Dunham v. Baird*, *supra*. A default taken on demurrer is a trial within the meaning of the act: *Bright v. Railroad Co.*, 1 Abb. N. Cas. 14. An application filed after the cause was called for trial, and the plaintiff was ready, but time was given the defendant to present an application for a continuance, was held to be too late for a removal: *Wait v. White*, 46 Tex. 338. It was further held in *Gurnee v. Brunswick City*, *supra*, that if the term occurs during the time a trial of the cause is stayed by an order of the state court, that is not such a term as is meant by the act. The court left undecided whether the third subdivision of § 639, Rev. Stat., allowing the removal of

causes to the United States courts on the ground of prejudice or local influence, has been repealed by the Act of 3d March 1875. It was held by the Supreme Court of the United States in *Lowe v. Williams*, 4 Otto 650, that a suit pending in an appellate state court, after it has been prosecuted to final judgment in a court of original jurisdiction, cannot be removed to the Circuit Court of the United States. A case pending in the Supreme Court of the state at the time the Act of 3d March 1875 was passed, and which was sent back to the lower court for further proceedings, stands like a new cause, and the right of removal exists; the defendants are not bound to take any action with regard to the removal till the case has been redocketed by the plaintiff: *Pettilon v. Noble*, 7 Biss. 449 (Northern District of Illinois). In the principal case the petition for removal of a suit in equity was filed in the state court during the term in which the bill was filed, but subsequently to the filing of the answer and the appointment of a receiver by that court. The petition was held to be filed in time under the Act of 1875, requiring the filing to be made "before" or "at" the term at which the cause could be first tried, and before the trial thereof.

IV. In *Peterson v. Chapman*, *supra*, an action of trover was brought by citizens of New York against a citizen of New York and citizens of Connecticut in the state court. The defendants removed the cause. The cause was remanded on the ground that the controversy was not one between citizens of different states. For to entitle a party to a removal, it is necessary that the citizenship of each individual plaintiff be different from that of each individual defendant. This was considered to be still an open question in the principal case, and the above case was not referred to. The court held in *Curraher v. Brennan*, 7 Biss. 497 (in the Northern District of

Illinois), that a removal will only be allowed, when the controversy is so completely between citizens of different states, that its termination will settle the whole suit, and it is not enough that the citizens of different states are interested in the controversy, but they must have such an interest that, when the question as to them is settled, the suit is determined. The whole suit must be removed; a fragment cannot be, because a party interested in that fragment is a citizen of another state from that of the plaintiff. In *Hervey v. I. M. Railroad Co.*, 7 Biss. 103, it was also decided that a part of a controversy cannot be removed; and, further, that foreign citizens, where they do not constitute the entire plaintiff or defendant, cannot remove a suit, as the Act of 3d March 1875, only contemplates those suits which are between citizens of one of the states of the Union, on the one side, and citizens and subjects of foreign states, on the other: *Hervey v. Railroad Co.*, *supra*. A controversy between citizens of a territory, and between citizens of the District of Columbia and citizens of a state, is not a controversy between citizens of different states: *McMurdy v. Life Ins. Co.*, *supra*. The Common Pleas No. 3, of Philadelphia county, held that a case, where a citizen is sued in his own state court by a citizen of another state, is not within the language of the constitution providing for controversies between citizens of different states: *Dunham v. Baird*, 1 W. N. C. 493; but the cause was subsequently removed to the Circuit Court, and the removal was held by that court to have been a proper removal: 2 W. N. C. 52. In *Leutz v. Butterfield*, 52 How. Pr. 376, a citizen of New York sued a citizen of Massachusetts in the state court. The plaintiff was assignee of another citizen of Massachusetts, of the claim in dispute. An application to remove was denied by the Common Pleas of New York, but the court in banc held the cause to be

removable, though the suit could not have originally been brought in the federal court. It was held in the principal case that the court, in the question of citizenship, will look to that of the trustee, and not that of the *cestui que trust*: also, that a suit may be removed, in which there are several controversies between citizens of different states, and of which one is wholly determinable as to them, and this is true, though others of the same party with petitioners for the removal, actually interested in other controversies embraced in the same suit, could not, on account of having the same citizenship with some of the other party, have themselves removed the suit; and also, that a controversy wholly between citizens of different states, fully determinable as between themselves, entitles either party to removal, though not fully determinable as between the remaining parties.

In *Gerardey v. Moore*, 4 American Law Times 387, Mr. Justice BRADLEY held, that the cause fell properly under the Act of 1866, but he expressed his opinion at considerable length to the effect that under the Act of 3d March 1875, all the individual plaintiffs need not have a different citizenship from all the individual defendants, and his honor said of the indispensable parties to the suit, "if some of the plaintiffs and defendants are citizens of the same state, the removal must be sought by all the defendants: one of the plaintiffs, or one of the several defendants cannot in this case remove the cause, but if all the plaintiffs on the one hand, and all the defendants on the other, are citizens of different states, then it does not require all the plaintiffs nor all the defendants to remove the cause, but any one of them may do so."

Mr. Justice MILLER, in *Board of Comm'rs v. Kansas Pacific Railroad Co.*, 5 Cent. L. J. 102, appeared to entertain the same opinion. That cause, however, he refused to remand on the ground

that the controversy, after removing the unnecessary parties to the suit, was wholly between citizens of different states.

In *Ex parte Grimbail*, *supra*, the trustee of A. filed a bill in the state court against the brothers and sisters of A., her administrator and her husband. All the parties to the suit were citizens of Alabama except A.'s husband, who was a citizen of New York. A.'s husband filed a petition to remove the cause into the federal court. The Supreme Court of Alabama held, affirming the decree of the chancellor, and following the dicta of Justices MILLER and BRADLEY, that as none of the other defendants had joined A.'s husband in the petition for the removal, and as the controversy was not one "wholly between citizens of different states" the jurisdiction of the state court was not ousted, as the petition did not show a ground of removal under any act.

Besides the cases that have been considered under the four preceding categories, several others have been decided under the Act of 3d March 1875, which it is, perhaps, more proper to consider under separate heads.

PROCEEDING IN STATE COURT UNDER LOCAL STATUTE—TIME.—In *The Lehigh Coal and Navigation Co. v. Central Railroad of New Jersey*, 4 W. N. C. 187, the plaintiff had leased a road in Pennsylvania to the defendant in New Jersey. A bill was presented by the former to the chancellor of New Jersey, to the effect that the latter was insolvent, and praying for the appointment of a receiver of the road in Pennsylvania. The chancellor appointed a receiver, whose appointment was confirmed by the Circuit Court of Pennsylvania. The plaintiff removed the cause to the Circuit Court of Pennsylvania, and an application was made to enforce the plaintiff's rights in that court. On motion to remand, the latter court held, that the cause must be remanded because, first, the appointment of a

receiver is in the nature of a final decree, and second, because the proceedings in the chancery of New Jersey are under a local statute, and the cause could not have been litigated in a federal court. But the decree of the chancellor can have no extra territorial jurisdiction, and the application for leave to enforce the plaintiff's rights with regard to the road in Pennsylvania, will be considered by this court, for the receiver is the servant of this court.

BOND AND PETITION.—The bond must be conditional for payment of costs by the parties removing the cause, in case the federal court should be of the opinion that the cause was improperly removed: *McMurdy v. Life Ins. Co.*, *supra*. A petition for the removal of a cause is insufficient unless it sets forth in due form, such as is required in good pleading, the essential facts not otherwise appearing in the case. This is a condition precedent to the removal of the cause, under the Act of Congress: *Gold-washing Co. v. Keys*, 6 Otto 199.

RECORD.—*Time of Filing—Who may file it.*—In *Osgood v. Chicago, &c., Railroad Co.*, 14 Am. Law Reg. N. S. 518, the court was doubtful as to what would be the effect of filing the record of the state court in the federal court, before the term next after filing the petition and bond in the state court, and whether the case would be in every respect before the federal court prior to its next term. In *Arthur's Adm'r v. N. E. M. Life Ins. Co.*, *supra*, it was held, that although it is optional with the party petitioning whether he file the copy of the record on or before the first day of the then next session of the Circuit Court, the other party may, if he please, file the copy himself, and in so doing is considered to have acted for the party petitioning, and this may be done at any time after the filing of the petition and bond in the state court.

WHEN ACTION OF STATE COURT IS RECOGNISED IN FEDERAL COURT.

—In *Williams Mower and Reaper v. Raynor*, 7 Biss. 245, in the Circuit Court for the Eastern District of Wisconsin, an order had been made in the state court to produce papers, &c. This order was disobeyed, and proceedings for contempt were instituted. The cause was subsequently removed to the federal court. It was there held that the latter court will recognise and enforce the order of the state court in the contempt proceedings; but if an appeal is taken to the superior court in the state, on the order, the circuit court will hold in abeyance the enforcement of the order till the appeal is disposed of; and the order for contempt will be enforced, if such proceedings were really in aid of the civil suit.

CONSTRUCTION OF THE CONSTITUTION OR AN ACT OF CONGRESS.—The court held in *Gold-washing Co. v. Keys*, *supra*, that a suit cannot be removed under the second section of the Act of 3d March 1875, simply because in its progress, a construction of the constitution or a law of the United States is necessary, unless this construction, in part at least, arises out of a controversy in regard to the effect and operation of some provision in that constitution or law on the facts involved in the case.

JURISDICTION.—It was held in the principal case that when a suit is re-

moved in which there are several controversies, and one controversy is wholly between citizens of different states, and determinable as to them, the circuit court, upon such removal, obtains jurisdiction over the whole cause, the remaining controversies therein being treated as incidental to that which authorized the removal.

The Circuit Court for the Northern District of Illinois held that the 10th clause of § 628, Rev. Stat., giving the United States courts jurisdiction "of all suits by or against any banking association established in the district for which court is held, under any law providing for national banking associations" does not invest said courts with exclusive jurisdiction over this class of corporations, and if a suit is brought against such associations in a state court, the cause cannot be removed to the federal courts. The jurisdiction of the federal courts is only concurrent with that of the state courts: *Pettilon v. Noble*, *supra*.

The jurisdiction of the federal court may arise during the pendency of a suit in a state court by such a change in the parties to the suit as would have entitled a removal, if the cause had been originally between those parties. See *Healy v. Provost*, 6 W. N. C. 578.

ARTHUR BIDDLE.

Supreme Court of Wisconsin.

THE APPLETON IRON CO. ET AL., RESPONDENTS, v. THE BRITISH AMERICA ASSURANCE CO., APPELLANT.

The mortgagee of chattels has the legal title to the property mortgaged, even before the debt is due, and he may take immediate possession of the property unless by express stipulation the mortgagor is permitted to retain possession.

Where, therefore, a person mortgaged chattels and insured the same, the loss, if any, to be paid to the mortgagees as their mortgage interest should appear, the policy containing a provision that if the property insured be sold or transferred, or if any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, then in every such case said policy shall be void, and the mortgagor was afterwards adjudicated a bankrupt

upon his own petition, and under an order of the U. S. District Court assigned all his property to a trustee for the benefit of his creditors: *Held*, that such assignment did not avoid the policy.

Where an insurance policy contained a clause that, if it should be assigned before loss, without the consent of the company endorsed thereon, such assignment should avoid the policy: *Held*, that a general assignment of the property of the assured to a trustee for the benefit of his creditors, executed by him under the order of the U. S. District Court upon his being adjudicated bankrupt therein, would not have the effect to transfer the policy to the trustee within the meaning of this clause.

Where an insurance company knows at the time of issuing a policy upon chattels, that they are then mortgaged, and agrees to pay the loss to the mortgagees, it is estopped from saying thereafter that the mortgagor had no insurable interest in the chattels when it issued the policy.

APPEAL from the Circuit Court of Winnebago county.

Finch & Barber, for appellant.

Charles W. Felker, for respondents.

The opinion of the court was delivered by

COLE, J.—The counsel for the defendant insists that the answer states a complete defence; that the proceedings in bankruptcy therein set forth operated to change the title and possession of the property destroyed so as to avoid the policy. It is averred in the answer that the insurance company issued its policy to the plaintiff, the Appleton Iron Company, insuring the wood mentioned, and thereby agreed to pay the other plaintiffs—who were mortgagees—the amount that should become due the Iron Company in case of loss, as their mortgage interest should appear. It is also averred that the interest of the mortgagees in the property exceeded the amount of the policy, so that the entire loss is payable to them. The policy contains this clause or condition: “That if the property insured be sold or transferred, or if any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, then in every such case said policy shall be void.”

It appears from the answer that the Iron Company before the loss occurred was on its own petition adjudicated a bankrupt by the District Court of the United States for the Eastern District of Wisconsin; that pursuant to the terms of the Bankrupt Law, and in accordance with a resolution of the creditors, a trustee was appointed to hold and distribute the estate; and that the bankrupt, by order of the District Court, did, by deed of assignment, convey, transfer and deliver all its property and effects (including the pro-

party in the policy described), to the trustee, to be applied for the benefit of the creditors of the bankrupt. It is further stated that the trustee accepted the trust, and that the transfer of the property of the bankrupt to him by virtue of the deed of assignment was without the knowledge or consent of the insurance company, and worked a forfeiture of the policy. The question therefore is, was the policy avoided by these proceedings in bankruptcy and the assignment or transfer made by the bankrupt to the trustee under the order of the District Court? The counsel for the defendant insists that it was; that there was a transfer or change of the title of the wood by legal process or judicial decree within the meaning of the policy.

When considered with reference to the facts in this case we can give no such effect to the bankrupt proceedings for this reason. By the terms of the policy the loss was made payable to the plaintiffs, Smith, Donkersly and Smith, as their interest should appear. It is admitted that their interest exceeded the amount of the policy. They were the mortgagees of chattels; the whole legal title of the wood was vested in them conditionally, leaving no such interest in the bankrupt as would pass to the trustee under the deed of assignment. It is the settled law of this state that the mortgagee of chattels has the legal title to the property mortgaged even before the debt is due, and he may take immediate possession of the property unless by express stipulation the mortgagor is permitted to retain possession. It is unnecessary to refer to the decisions of this court where these principles in regard to chattel mortgages are affirmed or recognised. It is sufficient to say that it is well established that such are the rights of the mortgagee of personal property. Consequently we think the assignment by the mortgagor to the trustee, under the circumstances stated in the answer, really worked no change in the title or possession of the wood. The title remained in the same persons as before the assignment and as when the property was insured. The interest of the parties in the same was unchanged, and the insurance company was not released thereby from its liability to pay the loss: *Bragg v. New England Mut. Life Ins. Co.*, 25 N. H. 289. There is a plain ground for discrimination between this case and such cases as *Adams v. The Rockingham M. F. Ins. Co.*, 29 Me. 292; *Young v. Eagle F. Ins. Co.*, 14 Gray 150; *Hazard v. Franklin M. F. Ins. Co.*, 7 R. I. 429, and *Perry v. Lorillard F. Ins. Co.*, 61 N. Y. 214, where it is held that an adjudication in bankruptcy against the insured and an assignment

under the bankrupt law, or an assignment by the insured under proceedings in insolvency is an alienation or transfer of property within the meaning of such clauses in the policy and defeats a recovery upon it. In those cases the insurance was upon real estate, and an assignment by the insolvent or bankrupt might well be held to operate as a transfer or change of title. A mortgage of real estate under the modern doctrine in this country does not convey the fee to the mortgagee, and in that regard is distinguishable from a mortgage of chattels which passes the entire legal title conditionally to the mortgagee. It is therefore not necessary in this case to deny the correctness of the proposition that a transfer or assignment by a mortgagor of real estate under insolvent or bankrupt proceedings, does work a substantial change in the title of the insured property and put an end to the policy where it contains a condition similar to the one before us. But here nothing passed by the assignment to the trustee, neither the legal title nor beneficial interest. It is clear that had the trustee attempted to interfere with the wood, he would have been a trespasser, and liable as such, the deed of assignment affording him no protection.

Of course the insurance company will not be heard to say that the Appleton Iron Company had no insurable interest in the wood when it issued the policy. For it knew that the wood was mortgaged at the time and agreed to pay the loss to the mortgagees. It is manifest that the insurance was for the benefit of the Iron Company, for it might pay the mortgage-debt and become the owner of the wood. At all events we must assume that when the contract was entered into all the facts connected with the title were known to the insurance company, and it saw fit to issue the policy with full knowledge of the precise interest which the parties had in the property. Nothing in fact has transpired since the policy was issued which in any way affects the rights of the parties, or has any bearing upon the liability of the company to pay for the loss, except the proceedings in bankruptcy already alluded to. Under these circumstances, we think the defendant is estopped from saying that the Iron Company had no insurable interest in the wood when it issued the policy. Such company certainly had an equity of redemption, a right to defeat the title of the mortgagees by a performance of the conditions of the mortgage.

There is a still further fact stated in the second defence, upon which considerable stress is laid by defendant's counsel. It is alleged that the policy of insurance was specifically described by

the Iron Company in its petition in bankruptcy, was mentioned as a part of its estate, and was transferred to the trustee by the deed of assignment. There is a clause in the policy that if it should be assigned before loss, without consent of the company endorsed thereon, this should avoid the policy. It is claimed that the deed of assignment transferred the policy within the meaning of this clause. But we think otherwise. It does not appear that the policy was ever delivered to the trustee, or that there was any actual assignment of it. A general assignment by the bankrupt under the circumstances would not have the effect to transfer the policy to the trustee.

We therefore think that the demurrer to the answer was properly sustained.

Order affirmed.

It seems to be settled by the great weight of American authority, that, in accordance with the decision in the principal case, by a mortgage of chattels the legal title to the thing mortgaged passes to the mortgagee. As stated by WRIGHT, J., in *Hill v. Beebe*, 12 N. Y. 556, 565, "a chattel mortgage is something more than a mere security. It is a conditional sale of the thing mortgaged, and operates to transfer the legal title to the mortgagee, to be defeated only by a full performance of the condition. Nothing short of actual payment, in case of a breach of the condition, before foreclosure or sale, or a voluntary waiver or surrender, can revest the legal title in the mortgagor." The doctrine that a mortgage of chattels transfers to the mortgagee the legal title to the thing mortgaged, is also supported by the following cases: *Butler v. Miller*, 1 N. Y. 496; *Bank of Rochester v. Jones*, 4 N. Y. 497; *Heyland v. Badger*, 35 Cal. 404; *Shuart v. Taylor*, 7 How. Pr. 251; *Parshall v. Eggart*, 52 Barb. 371; *Porter v. Parmley*, 13 Abb. Pr. (N. S.) 111; *Stoddard v. Dennison*, 7 Id. 309; *Brown v. Bement*, 8 Johns. 96; *Ackley v. Finch*, 7 Cow. 290; *Langdon v. Buel*, 9 Wend. 80; *Patchen v. Pierce*, 12 Id. 61;

Flanders v. Barstow, 18 Me. 357; *Flanders v. Thomas*, 12 Wis. 411; *Robinson v. Fitch*, 26 Ohio St. 659.

The mortgagee's interest, according to this class of cases, even before forfeiture, where he has not stipulated for the right of possession for a definite period, is nothing but a mere equity of redemption: *Hill v. Beebe*, 12 N. Y. 565; *Mattison v. Baucus*, 1 N. Y. 295. And in case of breach of condition, the title at law becomes absolute in the mortgagee, leaving a mere equity in the mortgagor: *Heyland v. Badger*, 35 Cal. 404; *Wright v. Ross*, 36 Id. 414; *Flanders v. Thomas*, 12 Wis. 411; *Langdon v. Buel*, 9 Wend. 80; *Parshall v. Eggart*, 52 Barb. 371; *Brown v. Bement*, 8 Johns. 96; *Porter v. Parmley*, 13 Abb. Pr. (N. S.) 111; *Stoddard v. Dennison*, 7 Id. 111; *Flanders v. Barstow*, 18 Me. 357; *McLean v. Walker*, 10 Johns. 141. See also *Constant v. Mattison*, 22 Ill. 558; *Dupuy v. Gibson*, 36 d. 198, and the cases cited to the first proposition in this note. Unless otherwise stipulated, according to this class of cases the mortgagee has the right to take possession of the chattel mortgaged, immediately upon the execution of the mortgage: *Shuart v. Taylor*, 7 How. Pr. 251; *Robinson v. Fitch*, 26 Ohio St.

659. See also *Wheeler v. Roberts*, 19 Ill. 274. This class of cases also makes a distinction between a pledge and a mortgage of chattels in this, that in the case of a chattel mortgage the possession ordinarily remains with the mortgagor, and the title is conveyed to the mortgagee, while in the case of a pledge it is necessary that the possession of the chattel pledged should pass to the pledgee, while the title remains in the pledgor. See *Sims v. Canfield*, 2 Ala. 555; *Gifford v. Ford*, 5 Vt. 532; *Conner v. Carpenter*, 28 Vt. 237; *Eastman v. Avery*, 23 Me. 248; *Day v. Swift*, 48 Id. 368; *Barrow v. Paxton*, 5 Johns. 258; *Brown v. Bement*, 8 Id. 97; *McLenn v. Walker*, 10 Id. 471; *Cortelyou v. Lansing*, 2 Cai. Cas. 200; *Ward v. Sumner*, 5 Pick. 60; *Ash v. Savage*, 5 N. H. 545; *Garlick v. James*, 12 Johns. 146; *Surber v. McClintick*, 10 W. Va. 242. See, however, *Tucker v. Buffington*, 15 Mass. 480; *Bonsey v. Amee*, 8 Pick. 236, where it is said that delivery is necessary to a mortgage. See also the Illinois cases cited below, which seem to imply that possession must be taken by the mortgagee before the legal title will pass.

In Illinois a chattel mortgage is considered as but a conditional sale, and when the mortgagor fails to perform the condition, the title, so far as it is held by the mortgagor, vests in the mortgagee. Where the possession is taken in accordance with the terms of the mortgage, the title passes even though debt be not then due: *Durfee v. Grinnell*, 69 Ill. 371; *Simmons v. Jenkins*, 76 Id. 479. See also *Wentworth v. The People*, 4 Scam. 553; *Constant v. Muttonson*, 22 Ill. 558; *McConnell v. The People*, 84 Id. 583. Until a forfeiture has accrued, the mortgagee in that state has, as it is said, only a lien upon the pledge (*sic*) for the security of his claim against the mortgagor: *Rhines v. Phelps*, 3 Gilm. 634. And before default or the exercise of

the right to take possession under an insecurity clause in the mortgage, the general property is no considered as being in the mortgagee so as to draw to it a possession in law: *Simmons v. Jenkins*, *supra*.

In Michigan the rule was originally laid down in *Tannahill v. Tuttle*, 3 Mich. 104, that by a mortgage of chattels the whole legal title passed conditionally, and upon breach of condition the title of the mortgagee became absolute at law; and that the general title being in the mortgagee, he was entitled to the immediate possession of the property, and to hold until condition broken, unless the parties stipulated otherwise. See cases cited on page 110; also Mr. Denslow's note to *Tannahill v. Tuttle*, 3 Mich. (Callaghan & Co.'s ed.) 104, where the Michigan, Illinois and Wisconsin cases upon this general subject are fully collected. In Michigan the doctrine is well settled in accordance with what is believed to be the better opinion, that in respect to real estate a mortgage conveys no title to the mortgagee before foreclosure, and is but a security for the debt; and until the title passes upon a foreclosure and sale of the property, the mortgagee has no legal interest in the land, and is not entitled to the possession: *Hogsett v. Ellis*, 17 Mich. 363; *Ladue v. Detroit & M. Railroad Co.*, 13 Id. 380; *Van Husin v. Kanouse*, 13 Id. 303; *Caruthers v. Humphrey*, 12 Id. 270; *Wagar v. Stone*, 36 Id. 364. And by the more recent decisions of that State the law as to mortgages of chattels has been made to harmonize with the more reasonable and equitable rule already prevailing as to mortgages of realty, so that now in that State mortgaged chattels do not cease to belong to the mortgagor until some steps are taken to end his rights by the enforcement of the mortgage, and the mortgage is considered a mere security to the mortgagee, and not a transfer of title. See *People v. Bristol*, 35 Mich.

32; *Flanders v. Chamberlain*, 24 Id. 305; *Kohl v. Lynn*, 34 Id. 361; *Lucking v. Wesson*, 25 Id. 443; *Cury v. Hewitt*, 26 Id. 228.

Although, irrespective of statutory changes, the rule in Michigan as respects chattel mortgages is believed to be contrary to the great weight of American authority, still it is so emi-

nently reasonable and equitable that it ought ultimately to prevail, and both real and chattel mortgages be placed upon the same footing in accordance with what the parties in nearly every case intend to create, viz., a mere security, and not a conveyance of their title to the mortgagee.

MARSHALL D. EWELL.

United States Circuit Court, Northern District of Illinois.

LEA & PERRINS v. DEAKIN.

The word "Worcestershire," as applied to sauce, has become generic in meaning by constant use for a particular species of sauce, and the fact that persons reside in Worcestershire, England, and manufacture there a sauce which they call "Worcestershire Sauce," does not give them the sole right to such application of the term.

The plaintiffs having been cognisant for many years of the fact that there was a particular kind of sauce manufactured by persons other than themselves, to which this term was applied, and having for many years taken no steps to prevent it, there may be said to have been something in the nature of an acquiescence on their part in such manufacture.

A decree, not appealed from, rendered by the Master of the Rolls in England, having jurisdiction both of the subject-matter and of the parties in a chancery suit, in favor of a principal, refusing an injunction and dismissing a bill in equity filed in such foreign court, to protect an alleged trade-mark, when offered in proof by the principal's agent in a chancery suit in a court of the United States, in which he is a defendant, is a bar to such action, when both suits are upon the same subject-matter of controversy, brought by the same plaintiffs, and when the bills in both cases ask for an account and an injunction for the same reasons and for substantially the same general relief.

It would be an anomaly that a principal could manufacture and sell a sauce in England, and his agent could be restrained in the United States from selling such sauce here, obtained from such principal.

Rogers & Appleton and Henry M. Collyer, for complainants.

Charles E. Pope and George C. Christian, for respondent.

The opinion of the court was delivered by

DRUMMOND, J.—This case has been fully and ably argued by the counsel of the respective parties, and as it has been pending for a long time, although I have not had, from other engagements, the opportunity of considering it so thoroughly as I could wish, I may state now the conclusions at which I have arrived, without going

into any special detail of the reasons leading to such conclusions. The plaintiffs are, and have been for a long time, the manufacturers of what has been called "Worcestershire Sauce," in Worcestershire, England. It is at present, and has been for some time, known as "Lea & Perrins's Worcestershire Sauce." The defendant is a resident of Wisconsin, and has been in the habit of receiving from England a sauce somewhat similar to that of the plaintiff, which is called the "Improved Worcestershire Sauce," prepared by Richard Millar & Co., of London. The defendant is their agent for the sale of this latter sauce in this part of the country. I think the proof establishes that there has long been known in the market a certain kind of sauce used for the table, on fish and meats of various kinds, as "Worcestershire Sauce"; that it is a sort of generic term given to this kind of sauce from the fact that it was originally manufactured in Worcestershire, England. It seems to have been manufactured also in other places, and the term "Worcestershire Sauce" seems to have been applied to that species of sauce. Under the circumstances, therefore, it can hardly be claimed that the plaintiffs, simply because they reside in Worcestershire, and manufacture a sauce which they call "Worcestershire Sauce," have the sole right to the application of the term to that species of sauce. I think that the proof also shows that the plaintiffs have been cognisant for many years of the fact that there was this kind of sauce manufactured to which the term was applied; that for many years they took no steps to prevent the parties from manufacturing the sauce; and that, therefore, there may be said to have been something in the nature of an acquiescence in the manufacture of the sauce.

The proof also shows that the plaintiffs filed a bill in chancery in England against the principal of the defendant, Millar, of London, on the ground that he or his company were manufacturing the very species of sauce which is the subject of controversy in this case, asking for an injunction to restrain him from such manufacture, and from using the term "Worcestershire Sauce," they claiming that they had the right to it as a trade-mark, and that no one else without their consent could use it, and also asking for an account from the defendant. The case was heard by the Master of the Rolls, Sir GEORGE JESSEL, and fully considered by him in 1876, and the injunction was refused and the bill dismissed. There was no appeal from this decree; on the contrary, it seems to have been

acquiesced in by the plaintiffs. I see nothing in the record to raise a doubt that the case was decided on its merits. I think, therefore, that this case is a bar to the action of the plaintiffs. They brought the suit against Millar, the principal of the defendant in this case, on the very subject-matter of controversy here; they asked for an injunction for the same reasons that the injunction is asked here, and for substantially the same general relief. It was refused by the Master of the Rolls, and the bill dismissed. Deakin, the defendant here, has acted for Millar, the defendant in that case. It would be an anomaly if it were true that Millar could manufacture and sell his sauce in England, and at the same time Deakin, who sells it here, and obtains it from him, could be restrained here at the instance of the plaintiffs from selling it.

By agreement between the parties, and the order of the court, many of the questions on the admissibility of evidence were submitted to the Master, and he made his report thereon to the court, and exceptions have been taken to his report. It is unnecessary for me to consider these various exceptions. It is sufficient to say, I think, there is evidence in the case which ought to be admitted, and from which these conclusions can be deduced. The result will be, therefore, that the bill will be dismissed.

This is the third reported civil action brought by the complainants in reference to their alleged trade-mark, not to mention the criminal case of *State v. Gibbs*, 56 Mo. 133; and as the principal case was bitterly and thoroughly contested, the trial consuming a week, unless the appeal which has been taken be perfected, this will probably be the end of litigation on this subject. In *Lea v. Wolff*, the first of these cases, reported in 15 Abb. Pr. (N. S.) 1, the controversy being in reference to an American brand of Worcestershire, the Supreme Court of New York, at special term, on motion of complainant for an interlocutory injunction, enjoined the use of defendant's labels, but refused to enjoin the use by defendant of the words "Worcestershire Sauce." At the general term, on appeal from the interlocutory order, the same court enjoined

both the use of the labels and words in controversy. At this point the contest ceased, the defendants, Wolff and Reessing, making under the New York practice a proffer of judgment, which was accepted by the complainants.

No full report of the decision of *Lea v. Millar*, the second case, has ever been published. It is referred to in Sebastian on Trade Marks, pages 7 and 64; and Airton on Decrees, 4th edition, page 242. Judge DRUMMOND gives in his opinion the essential features of the case.

The doctrine of *Lea v. Wolff*, would not seem to be in conflict with either *Lea v. Millar*, or the principal case for the court says in the first-named case:

"The defendants doubtless might, under proper circumstances, employ the name of a place where an article is manufactured, as well as the word descriptive of its character; but such words

must be employed honestly and properly, and not with a design to imitate and deceive to the detriment of another.

Where names are in common use, no one person can claim a special appropriation of them to his particular use, but where words and the collocation of words have by language become known as designating the article of a particular manufacturer, he acquires a right to them as a trade-mark, which competing dealers cannot fraudulently invade. The essence of the wrong is the false representation and deceit. When the improper design is apparent, an injunction should be issued."

From this extract and from the opinion as a whole, it is evident that the court based its decision upon the point that a fraudulent intent, shown by the use of similar labels, was so clearly and evidently manifest, that an injunction must issue as prayed for. In the case decided by Judge DRUMMOND, there was a clear distinction between complainants' and respondents' labels.

It is impossible in the little space allowed in a brief note on the case, to mention all of the many authorities quoted by the respective counsel, whose briefs were elaborate and exhaustive.

So far as the decision of Judge DRUMMOND is based upon the point that no words which have become generic in meaning can be appropriated as a trade-mark, its soundness cannot be questioned. Among the many adjudicated cases upon this point may be mentioned, *Canal Co. v. Clark*, 13 Wall. 323; *Thompson v. Winchester*, 19 Pick. 214; *Wolff v. Goulard*, 18 How. Pr. 64; *Sherwood v. Andrews*, 5 Am. L. R. N. S. 591; *Candee v. Deere*, 10 Am. Law Reg. N. S. 694; *Singer M'fg Co. v. Wilson*, Law Rep. 2 Ch. Div. 434; *Cocks v. Chandler*, Law Rep. 11 Eq. 446; *Lazenby v. White*, referred to in this last case; *Ford v. Foster*, Law Rep. 7 Ch. Appeals 611; and *Burke v. Cassin*, 45 Cal. 469.

It is quite immaterial whether the

term was generic at the time of its adoption by the claimant, or whether since its adoption it has become generic in meaning by constant use or otherwise. In either event the result attained, viz., generic character, is the ground of defence. It will be noticed that the word "Worcestershire" is geographical.

The general rule that the name of a place cannot be appropriated by any one exclusively as a trade-mark, has been well-settled in law since the cases of *Canal Co. v. Clarke*, 13 Wall. 311; *Candee v. Deere*, 10 Am. Law Reg. N. S. 694; *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416; *Glendon Iron Co. v. Uhler*, 13 Am. Law Reg. N. S. 543; *Blackwell v. Wright*, 73 N. C. 310.

The exceptions to such rule may be said to be, First. When the term ceases to be geographical in meaning and becomes a mere fancy name in reality, or in the general estimation or view of the public, as in case of the words "Rotherda," "Mount Carmel," etc.

Second. When the claimants own all the soil of the place from whence the article is produced, as in *Newman v. Alford*, 49 Barb. 588; *Congress & Empire Spring Co. v. High Rock Spring Co.*, 57 Barb. 526; *Dunbar v. Glenn*, 16 Am. Law Reg. N. S. 673.

Another class of cases exists, spoken of, but as it would often seem erroneously, as trade-mark cases, where a geographical name has been so long associated with and used for an article, that its original geographical meaning has been reduced to a secondary signification, when used in connection with the article sought to be protected, and in general estimation has become merged into the name of the article, as in the famous Glenfield Patent Starch Case, *Witherspoon v. Currie*, L. R. 5 E. & I. Appeals 508.

So in *McAndrews v. Bassett*, 10 Jur. N. S. 550; *Seixo v. Provezende*, L. R. 1 Ch. 192; *Radde v. Norman*, L. R. 14 Eq. 348; *Lea v. Wolff*, 15 Abb. Pr. N.

S. 1; and see *Blackwell v. Dabrell*, 17 Am. Law Reg. N. S. 673.

In all of these last-mentioned cases, it will be noticed that the judges seem to comment severely upon and base their decision on the fraud and deception actually committed, or attempted by the infringers, or their palpable intentions to thus deceive and defraud.

In a technical trade-mark case, since the right of protection is founded on the sole right of application to, or the right of property in a trade-mark, only a liability to deception need be proven. A technical trade-mark is the sole right of application against the whole world, which of course cannot exist in most of the cases last cited, many of which properly come under the head of unfair competition in business. The vital point in such cases is to determine whether or not the claimed trade-mark, when applied to the article in question, is considered in public common parlance as a fancy name, or still when so applied, partakes of its original geographical meaning. In the first instance it is a trade-mark case; in the second, a case of unfair competition in business if anything.

In some instances, a very strong presumption of fraud may be made merely by proof of the use by a defendant of an alleged trade-mark, where the defendant does not live in the place, but the plaintiff does, the name of which place is claimed as a trade-mark.

Even where the article of the original claimant has acquired a considerable reputation under such name, such presumption, however, may be rebutted in various ways. In the principal case it was met by proof of the generic meaning of the words in dispute. Other defences would arise under various circumstances. No general rule can be laid down upon the subject.

Perhaps, however, the greatest interest in the view of the legal profession, attaching to Judge DRUMMOND's decision,

will be found in the fact that this is believed to be the first reported trade-mark case in either Great Britain or the United States in which the doctrine of *res judicata* has been applied, where the decree offered in bar was entered by a foreign court. The leading cases holding that the decree on judgment of a foreign tribunal is conclusive are: *Hopkins v. Lea*, 6 Wheat. *113, *114; *Aurora City v. West*, 7 Wall. 101; *Durant v. Essex Co.*, 7 Wall. 107; *Baker v. Palmer*, 83 Ill. 568. The general principles of such cases are too well known to need citation.

It was most strenuously contended by the complainants' counsel, that the decree of a foreign court would not be conclusive, because the jurisdiction of the court in trade-mark cases, rested not alone upon the right of property in a trade-mark, but also on the ground of fraud upon the public, and that the American courts had the sole jurisdiction of fraud committed upon the American public, and sole jurisdiction over all property within their jurisdiction, in this case the property of complainants in their trade-mark in this country.

Judge DRUMMOND seems, however, to have followed the doctrine laid down by Lord WESTBURY in *Leather Cloth Co.'s Case*, 33 L. J. Ch. 199, insisted upon by defendant's counsel as now well recognised, that the jurisdiction of courts, in trade-mark cases, is founded solely on the right of property in a trade-mark, or exclusive right of application. See Adams on Trade-Marks 13, 75; Ludlow & Jenkins on Trade-Marks 3, 5, 35; Sebastian on Trade-Marks, 104, 105; Brown on Trade-Marks, §§ 30, 46, 112, 311, 450, 678; *Singer Manf. Co. v. Wilson*, on appeal to the House of Lords, L. R. 3 App. Cases 376. And also the view that the subject-matter of controversy was a right of protection, not property, strictly, such as personal or real property, having its *situs* in the United States, and therefore solely

subject to the sovereign power and jurisdiction of the United States also.

The principal case was commenced in April 1875; *Lea v. Millar*, in the fall of that year, and decided in July 1876. The decision of Judge DRUMMOND thus holds that even though the suit, in which the decree is rendered, was commenced at a later date than the suit in which it was pleaded or offered in evidence, still the bar of such decree is complete, following the doctrine of, among other cases, *United States v. Dewey*, 6 Bissell; *Sheldon v. Patterson*, 55 Ill. 512.

The principal case is interesting also, as involving necessarily the principle: 1st. That because a name has not been used in the United States for any article by any one prior to its claimed adoption in the United States by a claimant, it cannot be a trade-mark, provided it has been in common use for similar articles to those in question outside of the United States. This point was passed upon in *Burke v. Cassin*, 45 Cal. 479. 2d. That if a claimed trade-mark for an article cannot be maintained in the country where the article is made, it cannot be elsewhere, because the alleged trade-mark does not denote in the place where the article is

manufactured, that it is made by the claimant, and that elsewhere the alleged trade-mark could merely denote that the article was made where manufactured. This last proposition may involve a conflict of law where the trade-mark laws of two countries differ. The nearest approach to a reported decision upon this point is noticed in the Solicitors' Journal of July 25th 1876, vol. 2, p. 765, where the Master of the Rolls clearly maintained this last proposition as correct, although deciding the case upon another point. That both of these two propositions are correct, will appear when it is remembered, as alike maintained in *Burke v. Cassin*, *supra*, and by the Master of the Rolls, that if such principles be not maintained, the argument, if carried to its logical conclusion, enabled one of two manufacturers in the United States to steal the trade-mark of the other in a foreign country by prior use in such foreign country, creating for his article a reputation and name under such stolen trade-mark, and by such prior use in a foreign country prevent the real owner from ever using such trade-mark in such foreign country.

CHARLES E. POPE.

Supreme Court of Connecticut.

GEORGE R. HODGDON v. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD CO.

In the absence of any special custom, the contract of a shipmaster to carry a cargo to a certain port, means that he is to bring his vessel to some wharf or convenient and usual place of discharge, where he can deliver and the consignees receive the cargo.

The master of a vessel arrived in the port of New Haven, but could not reach any wharf for some days, on account of the ice. *Held*, that he was not entitled to demurrage, as he had not completed his voyage until he reached the wharf.

The fact, that the consignees, during the time the vessel lay in harbor, employed tugs to break a passage through the ice, and bring other vessels to their wharf, did not entitle this master to demand the same help towards the discharge of his cargo.

ASSUMPSIT for demurrage.

On December 14th 1876, the plaintiff received on board of a vessel at Baltimore, a cargo of coal consigned to the defendants, at New Haven, at which port he reported himself on the 24th of December, and asked for a berth in which to discharge; but he did not come to any dock, for the reason that the ice was so thick that he could reach no wharf in the harbor, unless through openings made by steam-tugs or otherwise, before the 19th of January 1877. Between these dates, the defendants daily broke a passage, through which they towed vessels to and from their own docks. On the day of the plaintiff's arrival, they opened a passage and towed through it vessels loaded with coal consigned to themselves, which had arrived prior to that day; and, when his turn came, they opened a passage for and towed his vessel to their dock. The ice delayed him four days, and for this he demanded damages. The defendants had a judgment.

The opinion of the court was delivered by

PARDEE, J.—Passing the question made as to the power of the person signing the bill of lading, and assuming for the purposes of the case that the defendants were bound by his act, still the plaintiff is not entitled to a judgment. He undertook to deliver the coal at the port of New Haven; and twenty-four hours after his arrival at that port and notice thereof to the defendants, they were to have, for the reception of the cargo, one day for every hundred tons thereof; after which they were to pay demurrage.

Upon notice to the defendants of the arrival of the plaintiff's vessel at New Haven, it was their duty to be ready to receive the coal or designate some wharf or other proper place where it could be deposited in a reasonable time. They failing in this duty, it was the right of the plaintiff to treat the contract as broken, and deposit the coal at the usual place, if there was any such, or procure one at their expense. The contract to deliver at the port of New Haven implies more than bringing the vessel into water within a line drawn across the mouth of the harbor; in the absence of any special provision, and of any custom to discharge into lighters, it imports that the carrier is to bring his vessel to some wharf or convenient or customary place of discharge where he can deliver and the consignees can receive the cargo, according to the usage of the port. In the case before us the plaintiff was barred by

the frost from every wharf or landing-place which the defendants could designate or he could select; he could not deliver the coal upon land; the contract did not oblige them to go upon the ice to receive it; in fact, his progress was arrested before he had brought his voyage to the contract termination, and that by no fault of theirs; it was a misfortune which the law must leave where it falls.

As the defendants did not contract to protect the plaintiff against the action of frost, they owed him no duty in respect to it. If for any reason they chose to open a way for the passage of another vessel, the contract relation between themselves and the plaintiff was not thereby changed; he acquired no right to the way thus made; such other vessel having gained prior access to and occupied it, as a matter of law it did not exist so far as the plaintiff is concerned.

In *Parker v. Winlow*, 7 E. & B. 940, the tides were neap when the vessel approached the designated wharf, and she ran upon the sand and lay there during some days until the tides were higher. Lord CAMPBELL, C. J., said: "If when the ship got fixed upon the mud bank the master had given notice that he was ready to discharge there, it might have been open to him to show that it was the duty of the other party to take the cargo there, and, if he could have shown such to be their duty, the lay days would have commenced. But no such notice was given; there was no suggestion of any custom requiring the consignees to procure lighters; and both sides acted as if they did not contemplate any unloading until the vessel got up to the wharf." In *McIntosh v. Sinclair*, 11 Irish Rep., Com. Law Series 456, PALLES, C. B., said: "The obligation of the shipowner under the charter-party is not alone to carry the cargo to the port of destination, but in addition, to deliver it according to the usage of the port. This duty is not discharged simply by arrival at the port or at the usual place of discharge within the port."

In *Aylward v. Smith*, 2 Lowell's Decisions 192 (Dist. Court of Mass., affirmed by the Circuit Court), the libellants' vessel came to the respondent's wharf, on the 20th of December, at high tide, and was made fast outside of another vessel, which was in the berth. This last was hauled out on the next day; but the libellant's vessel was then aground, and so remained; afterwards the ice made round her, and she could not be hauled in for several days. LOWELL, J., said: "The plaintiff says that he arrived at the wharf on the 20th of

December and reported to the defendant, and ended his voyage. This argument is specious; but it assumes that the vessel had arrived at the dock or wharf, when, in truth, she had only very nearly arrived. It has been held in two English cases concerning cargoes of coals shipped under contracts almost identical with this, that delays within the port for a considerable time, owing to a want of sufficient water at the place of delivery, would not require the freighter to receive the coals at another place, or cause the lay days to begin, though the contract had the clause that the ship was to go only so near to the place as she could safely get. It was held that although she could not safely go up while the tides were neap, yet that was one of the accidents of navigation which a vessel contracting to go to a tidal harbor ran the risk of. The distance at which the ship is kept from her berth by the low water is immaterial, if it be so far that the delivery of the cargo is prevented."

We do not advise a new trial.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF ERRORS OF CONNECTICUT.²

SUPREME COURT OF ILLINOIS.³

SUPREME COURT OF KANSAS.⁴

COURT OF CHANCERY OF NEW JERSEY.⁵

ATTORNEY-GENERAL. See *Corporation*; *Statute*.

BILLS AND NOTES. See *Evidence*.

Endorser—Waiver of Demand.—While a negotiable note payable on demand, is by statute dishonored at the end of four months if not paid, yet where such a note is on annual or semi-annual interest, it will be presumed, in the absence of evidence to the contrary, that the endorser made his endorsement with no expectation that demand of payment would be made at the end of four months, and therefore with a waiver of such demand: *Huges v. Werner*, 45 Conn.

The taking of security by the endorser at the time of the endorsement, is not in itself a waiver of demand and notice, but it is evidence

¹ Prepared expressly for the American Law Register, from the original opinions filed during October Term 1878. The cases will probably be reported in 7 or 8 Otto.

² From John Hooker, Esq., Reporter; to appear in 45 Connecticut Reports.

³ From Hon. N. L. Freeman, Reporter; to appear in 87 Illinois Reports.

⁴ From Hon. W. C. Webb, Reporter; to appear in 21 Kansas Reports.

⁵ From John H. Stewart, Esq., Reporter; to appear in 30 N. J. Eq. Reports.

of it, and goes to fortify the presumption arising on the face of the note : *Id.*

CONFLICT OF LAWS.

Receiptor—Goods brought into another State—Remedy.—A receiptor of goods attached, who by his receipt has bound himself to return the property to the officer upon request or pay damages, is not a mere naked bailee of the goods, but has a special property in them, and can maintain replevin against a person unlawfully detaining them from him : *Peters v. Stewart*, 45 Conn.

Where goods were attached in the state of Massachusetts, and there delivered by the officer to a receiptor, who left them in the hands of the debtor, by whom they were brought to Connecticut and sold, it was held :—

1. That the law of Connecticut governed upon the question whether the receiptor could maintain replevin for the goods.

2. That the receiptor was clearly entitled to the immediate possession of the goods as against the debtor, and that this alone would have been enough, under the statute in force when the suit was brought, to sustain the action of replevin.

3. That the purchaser of the goods, if he bought them in good faith of the debtor, could hold them against the receiptor.

4. That the burden of proof was on the purchaser to show that he bought them in good faith : *Id.*

CONSTITUTIONAL LAW.

State Existence—Rebellion—Impairing Contracts.—The political society which in 1796 was organized and admitted as a state into the Union, by the name of Tennessee, has remained the same body politic to this time. Its attempt to separate itself from that Union did not destroy its identity as a state, nor free it from the binding force of the Federal constitution : *Keith v. Clark*, S. C. U. S., Oct. Term 1875.

Being the same political organization during the rebellion and since that it was before, an organization essential to the existence of society, all its acts, legislative and otherwise, during the period of the rebellion, are valid and obligatory on the state now, except where they were done in aid of that rebellion, or are in conflict with the constitution and laws of the United States, or were intended to impeach its authority : *Id.*

The state of Tennessee having organized in 1838 the Bank of Tennessee, agreed by a clause in the charter to receive all its issues of circulating notes in payment of taxes, but by a constitutional amendment adopted in 1865, it declared the issues of the bank during the insurrectionary period void, and forbade their receipt for taxes. *Held*, that this was impairing the obligation of the contract : *Id.*

CORPORATION.

Interference by Attorney-General.—Interference by the attorney-general with corporations on the ground of a trust in the government, is limited to two classes of cases : 1. Religious, charitable, municipal or other corporations whose functions are solely public, and whose managers have destroyed the fund, or are putting it to improper uses, or otherwise abusing their functions. 2. Other corporations which are

exercising powers beyond those to which they are limited by the law of their organization : *United States v. Union Pacific Railroad Co.*, S. C. U. S., Oct. Term 1878.

EQUITY: See *Fraud* ; *Limitations*.

Control over Contracts made by an Insolvent.—By virtue of an agreement with the owner of certain lands, a railroad company, before paying the sum stipulated, entered upon the land, built their road thereon, and included it in a general mortgage of their lands, &c. After their insolvency, and the appointment of a receiver by this court, the owner applied for the payment of the amount. It appearing that the sum agreed upon was grossly exorbitant, the court refused to order its payment, but directed that the compensation justly due the owner be ascertained and paid : *Coe v. Midland Railway Co.*, 30 N. J. Eq.

EVIDENCE.

Parol to vary Writing.—The defendant had given the plaintiff his note for certain real estate conveyed to him by an absolute deed by the plaintiff. *Held*, In a suit on the note, that parol evidence is admissible on the part of the defendant, to show that the conveyance was not intended as a sale, but was made by the plaintiff for a certain purpose of his own, and upon an understanding with the defendant, that the land was afterwards to be conveyed back, and that the note was given at the time under an agreement that it was not to be paid : *Schindler v. Muhleiser*, 45 Conn.

EXECUTOR.

Investments by.—A direction to invest a share "in productive funds upon good securities," means only those that are designated by law ; and a disregard of such requirement renders the executor personally liable, in case of loss or depreciation : *Ward v. Kitchen*, 30 N. J. Eq.

A specific legacy may remain invested in the stocks set apart and designated by the testator for the purpose in his will.

An executor, apprehending a depreciation in the stocks in which a specific legacy is invested, should protect the estate by converting them:

FRAUD.

Representations amounting to more than commendation.—Where representations were made by the holder of a mortgage for \$7000, that he had sold the mortgaged premises to the mortgagor for about \$50,000 ; that it was first-rate property ; that the land was good and the timber thereon valuable ; that the land would be more valuable after it was cleared ; that the mortgage was a good mortgage ; and that the interest thereon had been paid regularly—all of which were false and fraudulent. *Held*, that they could not be regarded as *simplex commendatio* ; and a conveyance of lands obtained thereby was set aside : *Perkins v. Partridge*, 30 N. J. Eq.

Delay in Rescinding—Homestead—Wife's Rights.—The mere delay of the party who finds himself defrauded in rescinding a fraudulent contract and returning the property he has received under the contract, does not take away the right, if, in the interval, whilst he is deliberating, no innocent third party has acquired any interest in the property, and

the wrongdoer in consequence of the delay, is no way affected injuriously in his position. *Wicks v. Smith*, 21 Kans.

Where there is a verbal contract for the sale of a homestead made by the husband and wife to another party, with part performance and possession by the purchaser of such homestead, and upon investigation soon after, it is discovered by husband and wife that they have been greatly defrauded by the fraudulent representations of the purchaser and on account of such fraud have the right to avoid the contract. *Held*, as the homestead cannot be alienated without the joint consent of both husband and wife, either or both have the right, upon the return of the property received under the contract, to rescind the contract and any act of the husband in affirmance or recognition of such fraudulent contract, after the discovery of the fraud committed, without the consent or knowledge of the wife, is not binding on her. *Id.*

GOVERNMENT. See *Corporation* ; *Statute*.

HOMESTEAD. See *Fraud*.

Tenants in Common—Rights of Wife—Partition.—Where a person owns an undivided half of three hundred and twenty acres of farming land and resides upon and occupies it with his family, consisting of his wife and children, and an action of partition is brought by the other tenants in common with him to divide the real estate and have certain claims of lien-holders adjudged liens against the homestead interest of such person ; *Held*, that the wife is a necessary party in the action. *Wheat v. Burgess*, 21 Kans.

A judgment in such an action decreeing that the one hundred and sixty acres set off to the husband is subject to certain liens which, if not paid within a short time, shall be satisfied from the proceeds arising from a sale of said homestead, is void as against the wife in the absence of jurisdiction of her person by the court rendering the judgment. *Id.*

HUSBAND AND WIFE. See *Fraud* ; *Homestead* ; *Specific Performance*.

LIMITATIONS, STATUTE OF.

Demurrer—Equity—Trust.—When it clearly appears on the face of the bill that the complainant's right of action is barred, advantage may be taken of the Statute of Limitations by demurrer. *Partridge v. Wells*, 30 N. J. Eq.

The bar of the statute is as perfect an answer in equity as at law, to actions covered by the statute. *Id.*

The statute does not apply to such trusts as are not cognisable at law, and upon which a remedy can only be had in equity. *Id.*

MANDAMUS.

To compel City to pay Judgment.—Where a judgment is recovered against a city, a duty rests upon it to pay the same, which may be enforced by *mandamus* at the suit of an assignee of the judgment : *City of Chicago v. Sansom*, 87 Ills.

MUNICIPAL CORPORATION. See *Mandamus* ; *Officer*

Negligence—Unsafe Sidewalk.—Where city authorities suffered a sidewalk upon a frequented street, built some four feet above the ground to become dilapidated and out of repair for a considerable time, and the

stringers upon which the boards were nailed were rotten, so as not to hold the nails, and the boards were loose, making the walk dangerous, and they, after notice of its unsafe condition, did not repair the same, so as to make it safe, and the plaintiff, while passing over the same with her child in her arms, stepped upon a short board which gave way, causing her to fall upon her back, whereby she received an irreparable injury, and no want of prudence being attributable to her, it was *held*, that the right of recovery against the city for the injury was clear: *City of Chicago v. Herz*, 87 Ills.

Power to Tax.—A municipal corporation may levy a tax to pay the expense of collection, and to meet deficiencies likely to occur, over and above the sum actually required to pay its debts; and when this is done by the corporate authorities, in the fair and honest exercise of the discretion vested in them, the courts will not interfere: *Village of Hyde Park v. Ingalls*, 87 Ills.

NEGLIGENCE. See *Municipal Corporation; Railroad*.

OFFICE AND OFFICER.

Salary—Actual Possession of Office—Policeman.—A person is not entitled to the salary of a public office unless he both obtains and exercises the office: *Farrell v. City of Bridgeport*, 45 Conn.

A policeman of a city is a public officer, holding his office as a trust from the state, and not as a matter of contract between himself and the city: *Id.*

PARTNERSHIP.

Use of Firm Funds by one Partner—Land so Purchased.—Property purchased by one copartner with the funds of the firm, and title taken in the name of his wife, is partnership assets: *Partridge v. Wells*, 30 N. J. Eq.

Assignment.—Where a voluntary assignment is executed by L. & B., who are partners in the grocery business, and signed by their respective wives, who release all right, title and interest in the real estate thereby conveyed, and the assignment purports to assign and transfer all the property of L. & B. of every kind and description, except that exempt by law; and provides that from the proceeds of the property when sold, the assignee shall pay and discharge and pay all debts of L. & B., but if not sufficient therefor to pay rateably in proportion to the amount of the indebtedness, without distinction or preference; *Held*, That said assignment is general and conveys the partnership effects of the partners and their separate property, notwithstanding that where the names of L. & B. appear in the body of the written instruments, they are immediately followed by "co-partners," or "partners:" *Williams v. Hadley*, 21 Kans.

POSSESSION.

Unrecorded Deed—Notice—Execution—Equitable Title.—A person in actual possession of real estate under an unrecorded deed is, as against all persons who have actual notice of such deed, the legal and absolute owner of such real estate, and as against all other persons, he is the equitable owner: *Tucker v. Vandermark and Kirtland*, 21 Kans.

All persons are bound to take notice of all equitable interests any person may have in real estate, of which he is in actual possession: *Id.*

An attachment cannot be made to operate upon a merely legal title, as against the equitable owner of real estate, where the parties claiming under the attachment have (at the time the attachment is levied), or are bound by law to take notice of the paramount outstanding equitable title. *Id.*

PUBLIC SALE.

Mortgage Sale—Transfer of Bid.—It is often the case, a bidder at a public sale transfers his bid to another, and directs the deed to be made to such person, and if there be no fraud in the transaction, and no loss to the mortgagor thereby, there can be no objection. But if objectionable, it cannot be set up in an action of ejectment against remote purchasers without notice: *Johnson v. Watson*, 87 Ills.

RAILROAD.

Negligence.—Where a plaintiff carelessly walked upon the track of a railroad only a few steps south of an approaching train, without looking north to see if there was danger, and paid so little heed as not to hear the bell or whistle when sounded, or notice the calls of persons warning him of danger, and was run over by the engine, not moving at a high rate of speed, and there was no proof that the servants of the company wantonly or wilfully caused the injury, it was held, that the plaintiff's negligence was so gross as to preclude a recovery of damages by him, in a suit against the company; *L. S. & Mich. Southern Railroad Co. v. Hart*, 87 Ills.

REBELLION. See *Constitutional Law*.

RECEIPTOR. See *Conflict of Laws*.

RECEIVER. See *Equity*.

SPECIFIC PERFORMANCE.

Against Wife of Vendor.—It is erroneous, in decreeing the specific performance of a contract for the conveyance of land, to require the wife of the vendor to write in the conveyance, and, on her failure, for the master to convey her interest in the land, where she has not signed the agreement with her husband, or otherwise contracted to convey any interest she might have in the premises: *Mathison v. Wilson*, 87 Ills.

STATUTE.

Special Act directing Suit to be brought by Attorney-General.—Statutes directing suits for specific objects to be brought by an Attorney-General, and regulating the proceedings in them, are very common, such as *quo warranto*, or bill in equity against corporations to test the right to the exercise of their franchises, or declare them forfeited, or if insolvent to wind up their business and distribute their assets, and their validity has uniformly been recognised: *United States v. Union Pacific Railroad Co.*, S. C. U. S., Oct. Term 1878.

TITLE. See *Possession; Vendor*.

TRESPASS.

Assault—Provocation.—In trespass for an assault the provocation given by the plaintiff, though offered in evidence in justification of the assault, may yet, if insufficient for this purpose, be considered by the jury in mitigation of damages: *Burke v. Melvin*, 45 Conn.

And it makes no difference that the plea is the general issue, with notice only that the facts would be proved as a justification : *Id.*

TRUST. See *Limitations, Statute of.*

Trust created by Widow taking Deed of Lands sold ner Husband.—Where a purchaser of land died without completing his payments, and afterwards the vendor, without manifesting any desire or intention to declare a forfeiture of the contract, under a clause giving him such right resold one-half of the lot to a third person and the other half to the widow of the original purchaser, for the exact sum then due on the first contract, and the half sold to the widow was worth considerably more than the price paid by her, and she, on the payment, obtained a conveyance : *Held*, there was no forfeiture declared, and that she took the legal title in trust for the heirs at law of her husband : *Musham v. Musham*, 87 Ills.

USURY.

What will not Amount to.—When an agent procuring a loan of money for a party, charged and received from the borrower five per cent. of the amount, and \$100 for going to Chicago and procuring a release of an incumbrance, the party making the loan having no knowledge of this arrangement and deriving no benefit from it, it was *held*, that usury could not be predicated of the transaction : *Ballinger v. Bowland*, 87 Ills.

UNITED STATES. See *Corporation ; Statute.*

UNITED STATES COURTS.

Supreme Court—Review of Decisions of State Courts.—Where a case has been decided in an inferior court of a state on a single point which would give this court jurisdiction, it will not be presumed here that the Supreme Court of the state decided it on some other ground not found in the record, or suggested in that court : *Keith v. Clark*, S. C. U. S., Oct. Term 1878.

VENDOR AND PURCHASER. See *Fraud.*

Sale of Land without Title—Subsequent Acquisition of Title by Vendor.—A mere trespasser on lands sold certain improvements he had placed thereon and delivered the possession of the land and the improvements to his vendee. Subsequently he bought the title to the land. *Held*, it not appearing that he had given any deed or made any warranty or any false representations, that he was not estopped from recovering possession of the land from a vendee of his vendee. *Sheffield v. Griffin*, 21 Kans.

WILL.

Devise of Fund to be divided between Children where there are more than two.—T. gave to the children of D. a part of his residuary estate, to be equally divided between them as they should respectively come to the age of twenty-one years. At the time of making the will and of T.'s death, D. had two children, but before the elder came of age, another child was born, and all three are living, and the eldest has attained to majority. *Held*, That each of the three children is entitled to an equal share, and that a contrary intention cannot be inferred from the testator's use of the word "between :—" *Ward v. Tompkins*, 30 N. J. Eq.

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THE ASSUMPTION OF ENCUMBRANCES BY THE PURCHASER OF LAND.

WHEN the owner of encumbered realty sells it, what are the legal relations established with respect to the encumbrance?

1. Between him and the vendee?
2. Between the vendee and the owner of the encumbrance?
3. Between the heirs or devisees of the vendee and his personal representatives in the administration of his estate?

In England the purchaser of even an equity of redemption is held liable in equity to indemnify his grantor against ever paying the encumbrances, whether he stipulated to do so or not. In *Waring v. Ward*, 7 Ves. 333, Lord ELDON said: "The same principle applies to the purchase of an equity of redemption; for the party means at the time of the contract to buy the estate subject to that mortgage in relation to which mortgage the personal contract was entered into, and that was not his. If he enters into no obligation with the party from whom he purchases, neither by bond nor by covenant of indemnity to save him harmless from the mortgage, yet this court, if he receive possession and has the profits, would, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mortgage; for being become owner of the estate he must be supposed to intend to indemnify the vendor against the mortgage." Even if the grantee of encumbered premises expressly covenant to pay the encumbrances, his obligation is construed to be nothing more than an undertaking

to indemnify his grantor. See Mr. Cox's note to the case of *Evelyn v. Evelyn*, 2 P. Wms. 664. The reason of these decisions seems to be that the grantor has allowed the grantee to retain the amount of the mortgage-debt in his hands out of the purchase-money, and the grantee has accordingly bought the premises just so much cheaper.

No legal relation whatever appears to be established between the owner of the encumbrance and the vendee, by transactions between vendor and vendee, to which the encumbrancer is not a party.

In the administration of the estates of vendees of encumbered realty, the question constantly arose between the personalty and the realty as to which fund should bear the encumbrances. Although the personalty is the primary fund for the payment of decedent's debts, the realty remained the primary fund for payment of encumbrances thereon, unless the decedent had made them his personal debts, in which case they were thrown for payment, like all his other debts, upon the personalty.

The decedent was not held to have made them his personal debts by having expressly contracted to pay them, because that he would have been bound to do with or without stipulation: *Waring v. Ward*, *supra*; and, therefore, no intent to make the encumbrances his personal debts could be inferred from that act. In *Tweddell v. Tweddell*, 2 Bro. C. C. 101, A. having bought premises, subject to an existing mortgage, which he expressly covenanted to pay to the mortgagee by name, and to indemnify his grantor therefrom, devised the same to B. B. having applied to be exonerated out of the personal estate for the mortgage, THURLOW, Ld. Ch., held, that the testator's covenant was merely to indemnify his grantor, and that he had not made himself liable at law to the mortgagee, and of consequence had not made the debt his, so that it should be paid by his executors. And upon re-argument he affirmed the decree, saying: "This appears to be a common case where a man buys an equity of redemption. The question is whether he becomes personally liable to the mortgagee. The buyer takes it subject to the charge, but the debt as to him is a real, not a personal debt. His contract with the mortgagor is only that the debt shall not fall upon him; it is a mere contract of indemnity, as he would be bound without any specific contract to indemnify him as long as he can pay the money." Lord ALVANLEY, in *Woods v. Huntingford*, 3 Ves. 130, approved *Tweddell v. Tweddell*, the principle of which he said

was, "that where a man buys subject to a mortgage, and has no connection or contract or communication with the mortgagee, and does no other act to show an intention to transfer that debt from the estate to himself, as between his heir and executor, but merely that which he must do if he pays a less price in consequence of that mortgage, that is, indemnifies the vendor against it, he does not by that act take the debt upon himself personally." But he held also that a man might make an encumbrance his own personal debt, without an express declaration that he intended to do so, as by contracting directly with the creditor in a new and different instrument, and giving further security for a further advance. See also *Earl of Oxford v. Lady Rodney*, 14 Ves. 420; *Barham v. Earl of Thanet*, 3 M. & K. 607, and *Townshend v. Mostyn*, 26 Beav. 72. But even a personal covenant with the owner of an existing encumbrance for its payment if it be not otherwise altered, though it makes the vendee liable at law, has been held in the administration of his estate to be merely collateral to the charge upon the land, and not to show an intention to make the debt his own: *Tankerville v. Faucett*, *Shafto v. Shafto*, *Mattheson v. Hardwicke*, cited in note to *Evelyn v. Evelyn*, *supra*; *Hedges v. Hedges*, 5 DeG. & Sm. 330.

Parsons v. Freeman, quoted in a note to the case of *Evelyn v. Evelyn*, *supra*, and *Belvedere v. Rockfort*, 5 Br. P. C. 299, are often quoted as inconsistent with these views. In the former, "A. purchased an estate for 90*l.*, which was at the time mortgaged for 86*l.*, and he covenanted to pay 86*l.* to the mortgagee, and 4*l.* to the vendor. The court (Lord HARDWICKE) * * * thought that although the covenant was with the *vendor only*, and the vendee's personal estate therefore not liable in that respect to the *mortgagee*, yet the words were sufficiently strong to show an intention in the vendee to make it his personal debt." In the latter, the consideration was 900*l.*, of which 450*l.* were paid in cash, and the balance represented by a mortgage, "which said principal money of 450*l.*, with the interest thereof from the 10th day of February last, is to be paid and discharged by the said Robert Rockfort out of the consideration-money in this deed expressed." The receipt endorsed on the deed was for "450*l.* sterling in money on the perfection of the deed, and 450*l.* allowed on account of the mortgage. The House of Lords affirmed the decree of the Irish Chancery that the ancestor had made the encumbrance his personal debt." So far as the

question of the decedent's intention to make the mortgage his personal debt is concerned, both these decisions were within the principle of *Tweddell v. Tweddell*, *supra*, as qualified by *Woods v. Huntingford*, and the only doubt is as to the application of the principle, viz.: whether there was enough in the facts of either case to justify the court in finding that the vendee had shown an intention to do so. In *Butler v. Butler*, 5 Ves. Jr. 534, a mortgagee took title to premises in consideration of releasing the owner from a mortgage-debt to him, and of covenanting to pay a prior mortgagee. The facts being thus similar to those in *Parsons v. Freeman*, Lord ALVANLEY came to an opposite conclusion. And Lord THURLOW applied the principle quite as strictly in *Billinghurst v. Walker*, 2 Bro. C. C. 604. In *Belvedere v. Rockfort*, *supra*, Mr. Thurlow, afterwards Lord Chancellor, in arguing the question of the decedent's intention before the House of Lords, contended that he had made himself liable to the mortgagee at law. But as the decree of Lord Ch. LIFFORD was affirmed without opinion, there is nothing to show that this position of counsel, which was not, as we have seen, essential to the decision of the question whether the decedent had manifested an intention to make the encumbrance his own personal debt, was acceded to. In *Parsons v. Freeman*, it was expressly repudiated, and Lord THURLOW, in *Tweddell v. Tweddell*, and Lord ALVANLEY, in *Woods v. Huntingford*, expressed such positive disapprobation of *Belvedere v. Rockfort*, in all respects, that it cannot now be considered law. See also Coote on Mortgages 491; 2 Jarman on Wills 556; 2 Powell on Devises 675; Williams on Executors 1693; Fisher on Mortgages, sec. 1112.

In New Jersey there is no liability as in England, upon the purchaser of an equity of redemption to indemnify his vendor against the encumbrances. The grantee of encumbered land does not incur any personal responsibility for the encumbrances, unless he has expressly assumed them or has in some way shown his intention to do so. No personal responsibility will attach to him, because the conveyance describes itself to be under and subject to encumbrances: *Stevenson v. Black*, Saxton 338. The insertion of such a clause is regarded simply as a notice to the purchaser that he is buying only the equity of redemption, and so to qualify the covenants of warranty upon the part of the grantor. But, if besides mentioning the encumbrances, the amount of them is included in the consideration, the purchaser will be held between himself and his vendor to

have assumed the mortgage. Such was the case of *Tichenor v. Dodd*, 3 Green Ch. 455. The *habendum* clause of the deed was "subject, &c., which said mortgage or the amount thereof is computed as so much of the consideration to be paid to the said D. H. Tichenor." The grantor having been compelled after a sale of the premises to pay the deficiency, brought this action against the grantee to recover the same, which was sustained. *A fortiori*, this is the case where the deed contains language expressly assuming the mortgage: *Klapworth v. Dressler*, 2 Beas. Ch. 62. The responsibility incurred by the grantee is held as in England to be that of indemnifying his grantor from ever paying the debt. In *Tichenor v. Dodd*, *supra*, the grantee's duty of indemnifying the grantor was founded upon the English reasoning that he had been allowed to retain in his hands enough out of the purchase-money to do so. "By the terms of the deed, the mortgage-money was to be taken as part of the consideration, and hence the second proposition of counsel, that under such circumstances, equity raises upon the conscience of the purchaser an obligation to indemnify the mortgagor is correct."

Although it is held that there is no direct relation between the vendee and the owner of the encumbrance, the latter is allowed to work out his own salvation in equity. In *Klapworth v. Dressler*, *supra*, Dressler bought premises, and having given a mortgage for the purchase-money, conveyed them to Ise, the *habendum* clause of the deed being "subject to a mortgage of \$300 which H. Ise does hereby agree and assume to pay, and it is so understood by the parties to these presents." The mortgagees in a bill of foreclosure asked for a decree for the deficiency against Ise. The pinch of the case was whether the complainants, having no privity of contract with Ise, or right against him at law, could get such a decree against him in equity. GREEN, Ch., said, "The premises are not merely conveyed to the plaintiff, subject to the mortgage-debt. When this is done the grantee takes the premises subject to the encumbrance, but incurs no personal responsibility. But the grant here is made upon the specific condition that the grantee agrees and assumes to pay the debt. By the acceptance of the title, the clause becomes his covenant and he thereby becomes bound to the grantor to pay the mortgage-debt, and liable to him for any deficiency which may exist upon a sale of the mortgaged premises."

And he held that the grantee, Ise, having assumed for the grantor,

Dressler, the debt due the complainant, he would be regarded in equity as the principal debtor, and Dressler as the surety, and, therefore, the complainant would be entitled to a decree against him for the deficiency, on the equitable principle that "a creditor is entitled to the benefit of all collateral obligations for the payment of the debt for which a person standing in the situation of a surety for others has received for his indemnity, and to relieve him or his property from liability for such payment." In other words, equity would enable the mortgagee to take advantage of the duty of the grantee to indemnify the mortgagor. It is hard for the mind to follow this equity, because of the difficulty of regarding the grantee, with whom the mortgagee has no connection, as his principal debtor, and the mortgagor only as a surety. But all the early cases which allowed the mortgagee to recover the deficiency from the grantee, did so on this principle. It is better illustrated by the case in which it was established: *Curtis v. Tyler & Allen*, 9 Paige 433. Tyler had given a bond and mortgage to Murray, who assigned the same with a guarantee to Beers, who assigned the same to the plaintiff. Subsequently to Murray's assignment the defendant, Allen, executed his bond to him, conditioned to pay the mortgage or cause the same to be paid by Tyler. In a bill of foreclosure the plaintiff made Allen a party praying for a decree against him for the deficiency, if any, upon sale of the premises. WALWORTH, Ch., said, as Allen's bond was given "subsequent to the assignment of the bond and mortgage to which it was intended to be a collateral security, it is only upon a principle of equity that the present holders of Tyler's bond and mortgage to Murray are entitled to the benefit of this collateral bond. It is well settled, however, that where a surety, or a person standing in the situation of a surety, for the payment of a debt, received a security for his indemnity and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security. And it makes no difference that such principal creditor did not act upon the credit of such security in the first instance, or even know of its existence." See also *Vail v. Foster*, 4 N. Y. 314. An additional and simpler reason for this method of proceeding is given in *Crowell v. The Hospital*, 12 C. E. Green 650, viz.: That equity permits it to avoid circuitry of action.

So purely a duty of indemnifying his grantor is the assumption of encumbrances by the grantee considered in New Jersey, that if

for any reason he cease to owe indemnity to this grantor he ceases to be responsible to any one for the encumbrances. For instance, in *Crowell v. The Hospital, supra*, Currier conveyed premises to the hospital, subject to the payment of a mortgage held by complainant, which the hospital assumed and agreed to pay, the amount thereof having been deducted from the purchase-money. Subsequently the hospital reconveyed the premises to Currier, subject to the mortgage in the same terms. The complainant, in a bill of foreclosure, prayed that if the proceeds should be insufficient to pay the mortgage, a decree for the deficiency might be made against Currier and the hospital. The court held that the duty of the hospital to indemnify Currier having ceased by the reconveyance, their responsibility for the mortgage was extinguished. And so in the case of *Van Horn v. Powers*, 11 C. E. Green 257. And in the very recent cases of *Bull v. Titsworth*, 29 N. J. Eq. 73, and *Culver v. Badger*, Id. 78, it was held that if the clause assuming an encumbrance was inserted in the deed through fraud or mistake, the grantee would owe no indemnity to his grantor, and, therefore, could not be held for any deficiency by the mortgagee. The same conclusion would seem to follow, however the clause might be construed, because the defence set up by the parties was substantially that he had never made any agreement whatever.

By assuming a mortgage for the purpose of indemnifying his grantor, the grantee does not make it his own personal debt, and therefore, in the administration of his estate, it would remain a charge upon the realty, and not be thrown upon his personalty for payment. It is believed that the English authorities would be followed upon this point. And even though the decedent had made himself directly liable to the creditor, this, without other evidence of his intention to throw the encumbrance upon the personalty for payment, would not be enough to do so: *McLenahan v. McLenahan*, 3 C. E. Green 101.

In New York, it is held that taking premises under and subject to encumbrances, imposes no personal responsibility for them on the part of the grantee: *Stebbins v. Hall*, 29 Barb. 529; *Tillotson v. Boyd*, 4 Sandf. 520.

Nor does it alter the case, as in New Jersey, that the amount of the encumbrances is included in the consideration: *Binsee v. Page*, 1 Keyes 87; *Belmont v. Coman*, 22 N. Y. 431, in which the deed recited a consideration of \$12,000, "subject to four mortgages

(described) amounting to the sum of \$8500, which has been estimated as part of the consideration-money of this conveyance, and has been deducted therefrom." COMSTOCK, Ch. J., said: "It states that the deed is subject to the mortgages, the sum of which has been estimated as part of the purchase-money and deducted therefrom. If the language had stopped with declaring the subjection of the land to the lien of the mortgages, it would have been the ordinary case of the purchase of a mere equity of redemption. According to all the cases the land would have been the primary fund for the payment of the mortgages, yet without any other liability on the part of the grantee. But the other words, it seems to me, import nothing additional or different. On the contrary, they appear to be used for greater caution. They declare that the amount of the mortgages has been deducted from the consideration which had been previously set forth. The apparent meaning of this is, that so much of the purchase-money as the mortgages amount to being deducted, is not to be paid except as it is charged upon the premises."

When, however, the deed contained language expressly assuming the encumbrances, the liability of the grantee was considered to be simply that of indemnifying his grantor, and the mortgagee was in equity allowed to take advantage of this duty while it continued, for the purpose of recovering any deficiency after a sale of the premises: *Curtis v. Tyler*, *supra*; *Blyer v. Monholland*, 2 Sandf. Ch. 478. Fitz Randolph sold premises to Monholland, "subject to a mortgage made, &c., which the said party of the second part hereby agrees and assumes to pay." SANDFORD, A. V. C.: "It was a simple contract debt for lands sold and conveyed by the one to the other. The effect of this arrangement in equity, as between them, was to make Fitz Randolph the surety of Monholland, in respect of the debt due to the complainant. As between them and the complainant, it is immaterial whether he was to regard the relationship of principal and surety between them. It sufficed for them, that he held this mortgage-debt against Fitz Randolph, and that the latter had obtained the obligation of Monholland to himself to discharge that debt. This obligation enured in equity to the benefit of the complainant." See also *Cornell v. Prescott*, 2 Barb. 16; *Andrews v. Wolcott*, 16 Id. 21; *Mills v. Watson*, 1 Sweeney 374; *Marsh v. Pike*, 1 Sandf. Ch. 210.

Hence it followed, as in New Jersey, that if the grantor, for any

reason, is not liable for the mortgage-debt, or if the grantee has ceased to owe him any indemnity, the grantee will not be liable to the mortgagee: *King v. Whiteby*, 10 Paige 465; *Trotter v. Hughes*, 12 N. Y. 74.

But the decision of *Lawrence v. Fox*, 20 N. Y. 270, produced an entirely new current or rather a whirlpool of authorities which represent the law of New York to-day. Holly, at the request of the defendant, loaned him \$500, stating at the same time that he himself owed and had promised to pay the plaintiff that amount the next day, in consideration whereof the defendant promised to pay the plaintiff for him the next day. Upon this promise it was held that the plaintiff could maintain an action because it was made for his benefit. Upon the strength of this case a mortgagee was allowed in *Burr v. Beers*, 24 N. Y. 178, to sue the grantee in his own name for the whole mortgage-debt, without any resort to the premises. The deed conveyed the premises "subject, &c., which mortgages are deemed and taken as a part of the consideration of this conveyance, and which the party of the second part hereby assumes to pay." DENIO, J.: "If the plaintiff had sought to foreclose the mortgages in question, and to charge the defendant with the deficiency which might remain after applying the proceeds of the sale, and had made both the mortgagor and the present defendants parties, the authorities would be abundant to sustain the action in both aspects, * * * but I do not understand that the right to a personal judgment for the deficiency is based upon the notion of a direct contract between the grantee of the equity of redemption and the holder of the mortgage. The cases proceed upon the principle that the undertaking of the grantee to pay off the encumbrance is a collateral security acquired by the mortgagor which enures by an equitable subrogation to the benefit of the mortgagee; * * * the plaintiff does not ask to foreclose the mortgage, and does not make the principal debtor, Bullard, a party. If the judgment can be supported at all, it must be on the broad principle that if one person make a promise to another for the benefit of a third person, that third person may maintain an action on the promise. * * * Finally the question came squarely before this court in *Lawrence v. Fox*, *supra*, and we held, with hesitation on the part of a portion of the judges who concurred, while others dissented, that the action would lie."

In *Thorp v. The Coal Company*, 48 N. Y. 256, in which *King v. Whitely*, *supra*, was expressly overruled, EARL, C., said: "In the

deed from Franklin to it the defendant expressly assumed to pay the plaintiff's mortgage, and this, as it is now well settled, binds the defendant to the same extent as if it had also signed the deed. There has been some diversity of opinion as to the ground upon which the liability of the grantee in a deed in such case must rest, and it has finally been settled that it may rest upon the doctrine that where one person makes a promise to another for the benefit of a third person, the third person may maintain an action upon it: *Burr v. Beers*, 24 N. Y. 178. In such a case it is not needful that there should be any consideration passing from the third person. It is sufficient if the promise be made by the promisor upon a sufficient consideration passing between him and his immediate promisee, and when the third person adopts the act of the promisee in obtaining the promise for his benefit, he is brought into privity with the promisor, and he may enforce the promise as if it were made directly to him." This was followed by *Campbell v. Smith*, 8 Hun 6 and *Vrooman v. Turner*, Ibid. 78, in which the mortgagee was allowed to recover a deficiency directly from a grantee, who owed his grantor no indemnity whatever. How far the court went, may be seen from the syllabus of the last case. "A. executed a mortgage on certain premises to B., and afterwards sold and conveyed them to C., and by various mesne conveyances they came to T., a married woman. In none of the conveyances, except the one to T., was there any covenant by the grantee to pay the said mortgage. Held that T. was liable on her covenant."

In *Ricard v. Sanderson*, 41 N. Y. 179, the owner of premises subject to a mortgage conveyed them to the defendant to secure a certain indebtedness due by him, no other consideration being paid. The deed contained a clause that the defendant "agrees to pay off and discharge the said mortgage as and for part of the consideration-money of said premises." Held, he was liable for any deficiency after sale of the premises. It would seem from the facts that the defendant had not purchased the premises at all, but had simply taken them in trust as a security for indebtedness, so that it is hard to reconcile the decision with *Garnsey v. Rogers*, 47 N. Y. 234, in which the referee having reported that the absolute deed to the defendant, containing an assumption of the plaintiff's mortgage, was intended by the parties as a mortgage, the court held him not liable.

In *Simpson v. Brown*, 6 Hun 251, it was held, in accordance

with *Burr v. Beers*, *supra*, that the mortgagor could not release his guarantor so as to prevent the mortgagee from maintaining assumpsit, while in *Stephens v. Cassacker*, 8 Hun 117, it was held, in accordance with the old principle of indemnity, that he could do so. These cases show that the judicial mind is not yet on an even keel, and it may be further disturbed by *Merrill v. Green*, 55 N. Y. 270; the facts of which were as follows: an incoming partner, one of the defendants, gave a bond with the other defendant as security to Roberts, the outgoing partner, that he would pay the debts of the old firm. The plaintiffs, creditors of the old firm, brought suit on this bond, which had been assigned to them by Roberts. It was contended that they might recover under *Lawrence v. Fox*, without the assignment of the bond, and the statement of that fact in the complaint might be regarded as surplusage. GLOVER, J., "But I do not think the case within the principle of *Lawrence v. Fox*. Green was liable with Roberts for the payment of the firm debts. He agreed with Roberts, upon a valid consideration, to assume the payment of the whole of the debts, and Nichols undertook that he should perform this contract. This was no agreement made by Green and Nichols with the creditors or for their benefit, but one with Roberts to exonerate him from his liability for the debts of the firm by payment, which Green was to make, and in case of his default, such payment to be made by Nichols. All the liability incurred by either, was on the bond, and this was to the obligee only." Upon the principle as thus stated, it would be hard to sustain the right of the mortgagee to sue the vendee directly.

Chancellor KENT, in *Cumberland v. Codrington*, 3 John. Ch. Ca. 229, adopted the principle of *Tweddell v. Tweddell*, *supra*, in the administration of a decedent's estate to the full. But in 1830 the law was changed by the Revised Statutes (1 R. S. 749, sec. 4), providing that mortgages should always be paid by the realty, unless in the case of a will it were specially directed otherwise. The statute does not apply to liens which arise by operation of law as for unpaid purchase-money: *Wright v. Holbrook*, 32 N. Y. 587; *Lamport v. Beeman*, 34 Barb. 239; and as to such cases it is probable, in the light of *Burr v. Beers*, that *Cumberland v. Codrington* does not express the law of to-day.

H. G. W.

(To be continued.)

RECENT ENGLISH DECISIONS.

High Court of Justice. Exchequer Division.

CROWHURST v. THE AMERSHAM BURIAL BOARD.

If a man knowingly plant in his own land, and suffer to grow over the land of his neighbor a noxious tree, by which his neighbor's cattle are injured, an action will lie against him at the suit of such neighbor.

THIS was an appeal by way of special case, from the decision of the judge of the Buckinghamshire County Court in favor of the plaintiff.

The facts of the case, the arguments urged on either side, and the cases cited, appear from the judgment of the court.

J. O. Griffiths, Q. C., and *Cooper Wyld*, for the plaintiff.

Herschell, Q. C., and *Shaw*, for the defendants.

The judgment of the court was delivered by

KELLY, C. B.—This is an appeal from the County Court of Buckinghamshire, held at Chesham. The judgment in the court below was for the plaintiff, damages 21*l.*, and the judge stated a case for our opinion.

The material facts of this case are as follows: The defendants, some seventeen years ago, obtained a piece of land for the purpose of their cemetery, and fenced it around with a dwarf wall, in which at two places there were openings filled up with iron railings about two feet high. Where these railings occurred, the defendants planted two yew trees, at a distance of about four feet from the railing. These grew through and beyond the railings, so as to project over an adjoining meadow.

The plaintiff, two years before the alleged cause of action, hired this meadow to pasture his horses, for a term of three years. After the plaintiff had occupied the field for two years, his horse, which was feeding in the meadow, ate of that portion of the yew tree which projected over the field—the wall and rails not being sufficiently high to prevent a horse from so eating, and died from the effects of the poison contained in what he ate.

The question for our determination is, whether the death of the horse so occasioned, afforded any cause of action against the defendants.

There being no pleading in the county court, the question is not in any way affected by the form in which the cause of action is put

forward, and the facts as found by the judge of the county court must be taken as conclusive. The only matter, therefore, for our decision is, whether upon these facts any legal liability is disclosed.

The matter might appear to be somewhat trivial, but the case gives rise to a question which may not unfrequently arise, and therefore is of some general importance. Considering this, it is remarkable that there is an absence of any immediate authority by which our decision should be governed, and it is, therefore, necessary to determine what are the principles of law properly applicable to it.

Before doing this, it may be well to state shortly what I apprehend to be the effect of the finding of the county court judge. In the first place, I consider that the judge has so found the facts as to the planting and growth of the yew trees as to preclude the supposition of mere accident, and that the trees must be taken so to have been planted and grown with the knowledge of the defendants as to make them responsible for whatever might be the direct consequence of the original planting.

Secondly, although it is found that the plaintiff saw the horse in the meadow the day before it died, it is also found that he was not aware of the existence of the yew trees, and I think it must be taken that any such negligence on the part of the plaintiff as would disentitle him to recover is negatived. The mere fact that the plaintiff saw the horse in the field would go for nothing, and I do not think that he was bound to examine all the boundaries so as to see that no tree likely to be injurious to his horse was projecting over the field he had hired.

It ought also to be noticed that the decision in no way depends upon any question of fencing or the correlative rights and duties arising therefrom, and therefore the cases which were cited to us based upon these afford us no assistance.

The question seems to resolve itself into this : was the act of the defendants in originally planting the tree, or the omission to keep it within their own boundary, a legal wrong against the occupiers of the adjoining field, which, when damage arose from it, would give the latter a cause of action ?

On the part of the defendants it may be said that the planting of a yew tree in or near to a fence, and permitting it to grow in its natural course, is so usual and ordinary that a court of law ought not to decide that it can be made the subject of an action, especially

when an adjoining landowner, over whose property it grew, would, according to the authorities, have the remedy in his own hands by clipping.

On the other hand, the plaintiff may fairly argue that what was done was a curtailment of his rights, which, had he known of it, would prevent his using the field for the purpose for which he had hired it, or would impose upon him the unusual burden of tethering or watching his cattle, or of trimming the trees in question, and although the right so to trim may be conceded, this does not dispose of the case, as the watching to see where trimming would be necessary and the operation of trimming are burdens which ought not to be cast upon a neighbor by the acts of an adjoining owner. It may also be said that if the tree were innocuous, it might well be held, from grounds of general convenience, that the occupier of the land projected over would have no right of action, but should be left to protect himself by clipping. Such projections are innumerable throughout the country, and no such action has ever been maintained; but the occupier ought, from similar grounds of general convenience, to be allowed to turn out his cattle, acting upon the assumption that none but innocuous trees are permitted to project over his land.

The principle by which such a case is to be governed, is carefully expressed in the judgment of the Exchequer Chamber in *Fletcher v. Rylands*, Law Rep. 1 Ex. 265, 279, where it is said: "We think that the true rule of law is, that the person who for his own purposes brings on his lands—and collects and keeps there—anything that is likely to do mischief, if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." This statement of the law was cited and approved of in the judgment of the House of Lords in the same case.

In *Fletcher v. Rylands*, the act of the defendant complained of was the collecting in a reservoir a large quantity of water, which burst its bounds and flowed into the plaintiff's mine; but though the degree of caution required may vary in each particular case, the principle upon which the duty depends must be the same, and it has been applied under many and varied circumstances of a more ordinary kind, as in *Aldred's Case*, 9 Rep. 57 b, where the wrong complained of was the building of a house for hogs so near to the plaintiff's premises, as to be a nuisance; the laying of dung so high

as to damage a neighbor: *Tenant v. Goldwin*, 1 Salk. 360; and others which are cited in Comyn's Digest, tit. "Action on the case for Nuisance;" and in the judgment in *Fletcher v. Rylands*; in all which cases the maxim, "*Sic utere tuo ut alienum non lædas*," was considered to apply, and those who so interfered with the enjoyment by their neighbors of their premises, were held liable.

Other cases of a similar kind may be found in the books. Thus in *Turbervil v. Stamp*, 1 Salk. 13, it was held that an action lay by one whose corn was burnt by the negligent management of a fire upon his neighbor's ground, although one of the judges did not agree in the decision, upon the ground that it was usual for farmers to burn stubble. In *Lambert v. Bessy*, Sir T. Raym. 421, the action was in trespass *quare clausum fregit*. The defendant pleaded that he had land adjoining the plaintiff's close, and upon it a hedge of thorns; that he cut the thorns, and that they *ipso invito* fell upon the plaintiff's land, and the defendant took them off as soon as he could. On demurrer, judgment was given for the plaintiff, on the ground that, though a man do a lawful thing, yet if any damage befalls another, he shall be answerable if he could have avoided it.

This case was alluded to and approved of by Lord CRANWORTH, in his judgment in the case of *Rylands v. Fletcher*, in the House of Lords, Law Rep. 3 H. L. 330; where he says: "The doctrine is founded on good sense. For when one person in managing his own affairs causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer."

It does not appear from the case what evidence was given in the county court, to prove either that the defendants knew that yew trees were poisonous to cattle, or that the fact was common knowledge amongst persons who have to do with cattle. As to the defendants' knowledge it would be immaterial, as whether they knew it or not they must be held responsible for the natural consequences of their own act. It is, however, distinctly found by the judge: "The fact that cattle frequently browse on the leaves and branches of yew trees when within reach, and not unfrequently are poisoned thereby, is generally known," and by this finding, which certainly is in accordance with experience, we are bound.

Several cases were cited during the argument. In two of them, *Lawrence v. Jenkins*, Law Rep. 8 Q. B. 274, and *Firth v. Bow-*

ling *Iron Co.*, Law Rep. 3 C. P. Div. 254; the liability of the defendant was based upon his duty to fence. These, therefore, as I have already said, throw no light upon the present question. In *Wilson v. Newbury*, Law Rep. 7 Q. B. 31, which arose upon demurrer to a declaration, the court merely decided that an averment that clippings from the defendant's yew tree got upon the plaintiff's land, was insufficient, without showing that they were placed there by or with the knowledge of the defendant. Mr. Justice MELLOR, however, in giving judgment says, after alluding to *Fletcher v. Rylands*: "If a person brings on to his land things which have a tendency to escape, and to do mischief, he must take care that they do not get on his neighbor's land."

Another case which was cited during the argument was that of *Erskine v. Adeane*, Law Rep. 8 Ch. 756, in which the Court of Appeal held that a warranty could not be implied by the lessor of land let for agricultural purposes; that there were no plants likely to be injurious to cattle, such as yew trees, growing on the premises demised. This decision obviously rests upon grounds foreign to those by which the present case should be determined. I notice it, therefore, only that I may not appear to have overlooked it.

In the result I think that the judgment of the county court was correct, and that it should be affirmed with costs.

This is rather a novel application of the doctrine *sic utere tuo*, &c. The more common analogous instances are those of injuries by the escape of domestic animals, of fire, water, or building materials, and such like.

The most difficult question in such cases always is, when is it necessary to prove actual negligence in the defendant, in order to create a liability; and

1. As to *Animals*. It was doubtless the common law that an owner of cattle is liable for damages they may do to the crops of another, if they escape, even without any negligence on his part. He was bound to keep them at home at his peril. See *Ellis v. Loftus Iron Co.*, Law Rep. 10 C. P. 10, for a modern illustration of the familiar doctrine. It being the natural disposition of animals to wander away, and stray on to the lands of other people, and there con-

sume their grass and crops, the owner was held chargeable with knowledge of that natural disposition, and so liable, without proof of other negligence than merely allowing them to trespass. Besides, such entering upon another's lands was a trespass, whether in man or beast, and without any regard to the intention or negligence of the defendants: *Lee v. Riley*, 18 C. B. N. S. 722; *Decker v. Gammon*, 44 Me. 322; *Dolph v. Ferris*, 7 W. & S. 367; *Van Leuven v. Lyke*, 1 Comst. 515; *Angus v. Radin*, 2 South. 815; *Dunkle v. Kocker*, 11 Barb. 387. Possibly this might not apply so strictly to dogs, cats and such animals. See 17 C. B. N. S. 260, a very interesting case.

2. As to *Fires*. There is good authority for saying that the ancient law, or rather custom of England, appears to have been that a person in whose house

a fire originated, either by himself or his servants, and which afterwards spread to his neighbor's property and destroyed it, must make good the loss; and apparently without other proof of negligence. See 1 Ph. Ch. Rep. 316; Roll. Ab., *Action on the case*, B., tit. *Fire*; Bac. Ab., *Action on the case*. Otherwise there would have been little necessity for the statute, 6 Ann. c. 31, § 6, passed in 1707, which enacted that after a future day no action should be maintained against any person in whose "house or chamber" any fire should accidentally begin, nor should any recompense be made by such person for any damage suffered or occasioned thereby. This was subsequently extended so as to include any fire accidentally begun in any one's "stable, barn or other building, or estate:" st. 12 Geo. 3, c. 73, and 14 Geo. 3, c. 78. See also st. 7 & 8 Vict. c. 84, s. 1; the word "estate" clearly applying to land not built upon, and making the owner of such land not liable in the same manner as it previously had the owner of buildings. Since those statutes, therefore, it has always been held necessary in England to allege and prove some negligence on the part of the defendant or his servants, in order to charge him; and if that exists, he is liable. See *Vaughan v. Menlove*, 3 Bing. N. C. 468; 4 Scott 244 (1837); *Filliter v. Phippard*, 11 Q. B. 347 (1847). A fire cannot be "accidentally" begun, which arises from the defendant's negligence: *Webb v. Rome, &c., Railroad Co.*, 49 N. Y. 420 (1872).

And it has been held that those early English statutes form a part of the common law of this country: *Lansing v. Stone*, 37 Barb. 15 (1862); *Spaulding v. C. & N. Railroad Co.*, 30 Wis. 110. But whether that be so or not, and whatever the common law of England may have at one time been, it seems to be uniformly established in this country, that if one kindles a fire on his own

premises, for a lawful purpose, as for domestic indoor purposes, or to burn brush, fallow, &c., in the field, he is not liable for its escape, unless some negligence be actually proved, the burden of establishing which being on the plaintiff, as it is the very gist of his action. See *Clark v. Fort*, 8 Johns. 421; *Stuart v. Hawley*, 22 Barb. 619; *Calkins v. Barger*, 44 Id. 424; *Tourtellott v. Rosebrook*, 11 Met. 460; *Bachelor v. Heagan*, 18 Me. 32; *De France v. Spencer*, 2 Iowa 462; *Fuhn v. Reichart*, 8 Wis. 255; *Averitt v. Murrell*, 4 Jones (N. C.) 323; *Hanlan v. Ingram*, 3 Iowa 81. It may be different if he kindles a fire without a right to do so; negligence might not be necessary in such cases. See *Jones v. Festiniog Railway Co.*, Law Rep. 3 Q. B. 733.

On the same principle it was held by the Supreme Court of Pennsylvania in *Raydare v. Knight*, 2 W. N. C. 718 (1875), that where the oil in a tank on the defendant's premises accidentally caught fire, and overflowed on to the plaintiff's adjoining land and consumed his buildings, the defendant was liable, if the jury found he was guilty of negligence in keeping his tank uncovered and running his engine with wood, whereby sparks were emitted from his engine-house to the tank.

3. As to *injuries by escape of water*. Ever since the celebrated case of *Rylands v. Fletcher*, even if not before, it has been the received law of England, that one who collects and retains water on his premises by any artificial means, and in larger quantities than nature would furnish, is, *prima facie*, ordinarily liable, if such water escape and injure others, and without other proof of negligence than the mere escape.

One of the earliest applications of the doctrine was in *Tenant v. Goldwin*, 1 Salk. 360; 2 Ld. Raym. 1089; in which it was held that if the defendant had a privy near the plaintiff's land, and was bound by law to keep the wall in repair,

but for want thereof filth soaked through into the plaintiff's premises, he was liable, for he was bound to keep his filth at home. *Ball v. Nye*, 99 Mass. 582 (1868), is very similar and decided the same way; and see *Hodgkinson v. Ennor*, 4 B. & S. 229; *Humphries v. Cousins*, Law Rep. 2 C. P. Div. 239.

This distinction as to non-liability for escape of water which falls *naturally* upon the defendant's land, and escapes *naturally* therefrom, and as to liability for that which is *artificially* accumulated, or brought into the defendant's land, was fully established in the well-considered cases in the Common Pleas of *Smith v. Kenrick*, 7 C. B. 515 (1849), and *Baird v. Williamson*, 15 C. B. N. S. 376 (1863). See also, *Smith v. Fletcher*, Law Rep. 7 Ex. 305 (1872).

The recent case of *Hardman v. North Eastern Railway Co.*, 3 C. P. Div. 168 (1878), furnishes an interesting application of this rule. The plaintiff owned a dwelling-house adjoining a railway, and separated from it by a wall built and maintained by the company. They had piled up heaps of dirt and rubbish against this wall, and the rain falling on it percolated through the wall and injured the plaintiff's house adjoining, dampening the walls and paper thereon, &c. It being alleged to have been negligently and improperly deposited by the defendants, the Court of Appeal decided that a good cause of action was set forth in the declaration, and they said the piling up the rubbish must be considered an "artificial structure," within the rule of *Fletcher v. Rylands*. And see *Broder v. Saillard*, 2 Ch. Div. 700.

The rule laid down in *Rylands v. Fletcher*, was dissented from in *Brown v. Collins*, 53 N. H. 442 (1873), although the decision did not necessarily involve exactly the same point: but it was fully approved in the well-reasoned case of *Cahill v. Eastman*, 18 Minn. 324 (1872), holding that a party is liable for the

natural and necessary consequences of his acts on his own land, without regard to his care and skill in conducting them. See also, *Selden v. Delaware & Hudson Canal Co.*, 24 Barb. 362.

Rylands v. Fletcher was also questioned in *Losee v. Buchanan*, 51 N. Y. 487, and said to be in direct conflict with the law as settled in this country, and it was there decided that if a steam-boiler on the defendant's premises explodes, and pieces thereof are thrown on to the plaintiff's adjoining premises, and destroys his property, the defendant is not liable without proof of negligence; but the case did not necessarily decide that the negligence must be proved *alimds* from the fact itself. See 57 N. Y. 567, DWIGHT, C. On the other hand, in *Pirley v. Clark*, 35 N. Y. 520, it was held that the owner of an artificial pond was liable to an adjacent owner, into whose lands the water percolated under the surface, and without any proof of negligence. And see *Wilson v. New Bedford*, 108 Mass. 261, though this case was under a statute.

But whether one who artificially collects and stores water on his premises, is or is not liable for its escape, without proof of some negligence, all agree, even the English courts, that if the escape is due to the act of God, *vis major*, as an extraordinary freshet, which could not reasonably be anticipated, the owner is not liable, if guilty of no negligence. *Nichols v. Marsland*, 2 Ex. Div. 1; affirming s. c. in Law Rep. 10 Ex. 255, a very important case; and limiting the application of *Fletcher v. Rylands*, and holding that *vis major*, or the act of some third person, which the owner had no reason to anticipate, may sometimes excuse him from responsibility. See *Mahoney v. Libbey*, 123 Mass. 22 and 23; *Gorham v. Gross*, 125 Mass. 338.

4. As to fall of building material and the like. The owner of a building adjoining a highway, is *prima facie* liable, if the building falls and injures a passer-by.

From the happening of the accident, in the absence of sufficient explanatory circumstances, some kind of negligence may well be presumed, and unless explained, may well be held to create a liability. *Mullen v. St. John*, 57 N. Y. 567 (1874). And see *Kearney v. London, &c., Railroad Co.*, Law Rep. 5 Q. B. 411; affirmed in the Ex. Ch., 6 Q. B. 759 (1878); *Byrne v. Bradle*, 2 H. & C. 722; *Scott v. London Dock Co.*, 3 H. & C. 596.

So, in *Shipley v. Fifty Associates*, 106 Mass. 104 (1870), it was held, following *Fletcher v. Rylands*, that if a person maintains a building on his land, with a roof so constructed, that snow and ice collecting on it from natural causes, will naturally and probably fall into the adjoining highway, he is liable, without other proof of negligence, to a person injured on the highway by such fall of snow, without fault on his part. See also *Gorham v. Gross*, 125 Mass. 238 (1878). So, if a person, in blasting rocks on his own land, causes fragments thereof to be thrown on to the land and buildings of another, he is liable, without any other proof of negligence, if

that be necessary, than the act itself: *Hay v. Cohoes Co.*, 2 Comst. 159, 163.

The principle involved in this case of *Crowhurst v. The Amersham Burial Board*, seems to have governed a very recent case in the Common Pleas decisions, which was not apparently cited. There the plaintiff and defendant owned adjoining lands, separated by a wire fence which the defendant erected, and was bound to maintain. From long exposure, the strands of the wires composing the ropes of the fence decayed, and pieces of it fell to the ground on the plaintiff's side, and lay hidden in the grass. The plaintiff's cow, lawfully grazing there, swallowed a piece of the wire about eight inches long, and died in consequence. The defendant was held liable for the value of the cow: *Firth v. Bowling Iron Co.*, 3 C. P. Div. 254 (1878). And see *Humphries v. Cousins*, C. P. Div. 239.

In view of the somewhat conflicting opinions on this subject, it seems safe to say that the precise limits of the doctrine of *sic utere tuo ut alienum non laedas*, may not yet be definitely determined.

EDMUND H. BENNETT.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

B. F. SAUSSER v. DANIEL STEINMETZ.

A parol agreement to lease for more than three years being within the Statute of Frauds, it is not a fraud for one party to refuse to execute it.

An action lies for the breach of such agreement, but the damages recoverable are such only as result directly from the breach. Nothing can be recovered for the loss of the bargain, nor is the rent named in the proposed lease admissible as a measure of the damages.

In the absence of evidence that the lessor was prevented from leasing to another person, and no claim being made for money expended in improvements or repairs, made specially necessary by the proposed lease, his damages must be merely nominal.

THIS was an action brought by the lessor defendant in error, for the breach of a parol contract to lease a store for five years. The special count of the declaration alleged the agreement to lease; the alterations and improvement of the premises by the plaintiff

in accordance with the contract; his willingness to lease and his tender of the keys and of possession of the premises, and his offer to execute a lease in accordance with the contract. It also alleged the refusal by the defendants to take the premises and pay the rent, and averred that the property remained unoccupied, and that the plaintiff suffered loss through the expense of the alteration and loss in general owing to the failure of the defendant to take the property. The defendant filed two pleas: 1. That there was a mutual rescission of the contract. 2. The Statute of Frauds.

The evidence, so far as the Statute of Frauds was concerned, was to the effect that the plaintiff, Steinmetz, offered an unsigned lease, which the defendant, Sausser, was unwilling to sign, and thereupon new negotiations took place between the parties, and that at a later period Sausser, the defendant, tendered a lease which Steinmetz refused to execute; that the negotiations were then discontinued, and that, shortly afterwards, Steinmetz sent the keys and a letter to defendant, offering to execute the lease "as agreed upon;" that Sausser persisted in his refusal, and that the property was not let until a year had passed.

Among other points presented by the defendant to the court below for the charge to the jury was the following, which was refused: "The plaintiff not claiming damages by reason of the alterations and improvements mentioned, and there being no evidence of any other specific damages sustained, should your verdict be for the plaintiff, the damages to be assessed can only be nominal damages." And the court, *inter alia*, charged the jury as follows: "Now in this case a gentleman had leased his property for \$2000, and, by the violation of the contract, he did not receive a dollar, and you might consider that the \$2000 represents the amount of injury that he sustained, if, as he tells you, he advertised and was only able to rent his place at the end of the year, and you may take that as a measure of damages if you wish." There was a verdict for the plaintiff for an amount about equivalent to one year's rent under the contract, with interest, &c.

B. F. Fisher, for plaintiff in error.—"Tender must be made of a lease or deed:" *Brown v. Metz*, 5 Watts 164; *Smith v. Webster*, 2 Id. 478. "Damages cannot be recovered for loss of the bargain:" *Bowser v. Cessna*, 12 P. F. Smith 149; *Huber v. Burke*, 11 S. & R, 238; *Southerland v. Purry*, 2 P. & W. 145; *Harris v.*

Harris, 20 P. F. Smith 174; *Thompson v. Sheplar*, 22 Id. 160; *Ewing v. Tees*, 1 Binn. 450; *McNair v. Crompton*, 11 Casey 28; *Meason v. Kaine*, 17 P. F. Smith 126; *McClowry v. Croghan's Administrators*, 7 Casey 22; *Burr v. Todd*, 5 Wright 213; *Dumars v. Miller*, 10 Casey 319; *Hertzog v. Hertzog*, Id. 418; *Ewing v. Thompson*, 16 P. F. Smith 383; *Bender v. Bender*, 1 Wright 419; *Ashcom v. Smith*, 2 P. & W. 211.

A lease for more than three years comes within the same ruling of the Statute of Frauds as contracts for sale of land: *McClowry v. Croghan's Administrator*, 7 Casey 23; *Burr v. Todd*, 5 Wright 213; *Bowser v. Cessna*, 12 P. F. Smith 148; *Ellet v. Paxon*, 2 W. & S. 433.

The mere refusal to fulfil a contract invalid under the Statute of Frauds is not such fraud as that the court will take the case out of the statute therefor: *Harris v. Harris*, 20 P. F. Smith 170; 22 Id. 163; *Ruckert v. Domenee*, 2 W. N. C. 195.

The measure of damages in an action by the vendee against the vendor for the breach of a parol contract of a sale of land is the amount of purchase-money paid with interest and expenses; if no purchase-money has been paid, then the expense and trouble incurred by the vendee in procuring a title; but he cannot in the absence of fraud recover damages for loss of the bargain: *Dumars v. Miller*, 10 Casey 319; *Hertzog v. Hertzog*, 10 Id. 418; *Bender v. Bender*, 1 Wright 419; *Haines v. O'Connor*, 10 Id. 320; *McNair v. Compton*, 11 Casey 23; *Twill v. Granger*, 8 N. Y. (4 Seld.) 115; *Newbrough v. Walker*, 8 Grattan R. (Va.) 18; *Sands v. Arthur*, 4 W. N. C. 502.

Joseph R. Rhoads, for defendant in error.—The tender of a deed or lease signed is not necessary when the action is not on the lease, but for a breach of a parol contract to lease. Tender of a deed or lease is not necessary when the vendee has refused to accept: *Tinney v. Ashley*, 15 Pick. 546, 552; *Weaver v. Zimmerman*, 3 W. N. C. 56; *Hampton v. Speckenagle*, 9 S. & R. 222.

The opinion of the court was delivered by

GORDON, J.—It would appear from the evidence in this case that some time in the fall of 1871 B. F. Sausser, representing himself and his copartners, made a parol agreement with Daniel Steinmetz, the plaintiff below, to lease for the term of five years from the 1st

of January then next following, certain premises on North Fifth street, in the city of Philadelphia. Steinmetz agreed to make certain alterations in the premises required and deemed necessary by Sausser in order properly to fit them for the business the defendants proposed to carry on therein. According to the finding of the jury the plaintiff performed his part of the agreement, but the defendants were in default in that they refused to execute the lease. For the breach of this oral contract this suit was brought, and in discussing the measure of damages to which the plaintiff was entitled, the court below charged: "Now in this case a gentleman had leased his property for \$2000, and by the violation of the contract he did not receive a dollar, and you might consider that the \$2000 represents the amount of injury that he sustained, if, as he tells you, he advertised and was only able to rent his place at the end of the year, and you may take that as a measure of damages if you will."

The serious fault in this instruction is, that it is based on a false premise; the plaintiff had not leased his property. The proposed lease was within the Statute of Frauds, hence the parol agreement to lease could give it no force, and to predicate anything whatever of that intended lease was error. Either party had the right to refuse its execution, and the defendants were guilty of no fraud in availing themselves of such right. Neither party could plead ignorance of the statute, and hence both are presumed to have known that either might take advantage of its terms; and that the defendants did avail themselves of that privilege cannot be regarded as a fraud on the plaintiff: *Harris v. Harris*, 20 P. F. Smith 170.

What these parties had was but an agreement to lease, and although for the breach of such an agreement, according to *Weaver v. Wood*, 9 Barr 220, an action will lie, yet necessarily the damages recoverable are such only as result directly from such breach.

What then is the true measure of damages in this case? Not the amount of the proposed rent, for that, by the statute, the plaintiff is not entitled to; neither can it be used for such measure, for the lease itself being for a greater term than three years, is void, and so cannot be used for any purpose whatever. He could not recover for the loss of his bargain, for on authority this is not allowable: *Dumars v. Miller*, 10 Casey 319. It does not appear that in consequence of the agreement with the defendants Steinmetz was pre-

vented from leasing to some other party, for at that time he had no other offer, and so it would seem that unless he was induced by his contract with the defendants to so alter the premises as to unfit them for ordinary purposes, or to put work upon them which was unnecessary for their improvement or repair, he has suffered no injury from the breach complained of, and his damages are but nominal.

If the rule, submitted by the court to the jury, is to obtain, then may a contract void by the statute be specifically enforced. Says the learned judge, you may measure the damages by the amount of the proposed rent; the premises, notwithstanding the efforts of the landlord to get a tenant, have remained unoccupied for one year, so you may assess damages at one year's rent; but of course the same rule must apply had the premises under like condition remained unoccupied for the whole term of five years. But this was all there was of the parol contract; when the rent is paid the contract is fulfilled on the part of the lessee, and therefore there is a specific execution of it. By the same rule you might enforce a parol contract for the sale of land and so annul the Statute of Frauds and Perjuries altogether, a result not allowable either in reason or on authority: *McClowry v. Cloghan, Admr's*, 7 Casey 22; *Wilson v. Clark*, 1 W. & S. 554.

It follows that as the case stood in the court below the defendant's first point should have been affirmed, since the plaintiff having proved no actual damage resulting from the breach of the contract to lease, was entitled only to a judgment for nominal damages.

This disposition of the eighth specification, renders comment on the remaining exceptions unnecessary.

Judgment reversed, and a new venire ordered.

The foregoing case is one which indicates with clearness what is the scope of the application of the Statute of Frauds of Pennsylvania to contracts for the sale or lease of lands? The decision as to the measure of damages, assuming the contract not to comply with the statute, is sustained by all the law that had ever been laid down on the subject in this state, and the action being for a breach of a parol contract to lease, the Statute of Frauds did not apply in any other relation.

Both in the above case and in *Sands v. Arthur*, 84 Penn. St. 479, there was doubt on the facts as to whether the deed or lease as tendered was in accordance with the parol contract, when of course the deed, &c., would be no compliance with the Statute of Frauds: this consideration was, however, of no importance in the above case of *Sausser v. Steinmetz*, because the action was for a breach of a parol contract, the lease having never been properly executed, and the memorandum offered by the plaintiff

below being manifestly insufficient as a compliance with the statute: and in *Sands v. Arthur*, the decision was not rested in any way on the point as to whether the deed was in accordance with the contract or not. The expression of opinion contained in the decision of the Supreme Court in *Sausser v. Steinmetz*, that neither party in that case was bound, was of course correct, the lessor never having signed or tendered a writing or deed properly executed under the first section of the Statute of Frauds; the decision leaves entirely untouched, then, the important question how far the lessor if he had executed and tendered a sufficient memorandum or lease could or could not have recovered the entire consideration of the contract? This question is of much interest and is in great doubt. It had been supposed (Leading Cases in Equity, vol. 2, pt. 2, p. 1093; 1 Whart. on Ev., 1st ed., p. 103, §§ 865 and 866, and 16 Am. Law Reg. 642) that this question in one aspect at least was definitely settled by the case of *Tripp v. Bishop*, 56 Penn. St. 426, Judge Strong giving the opinion of the court. There have, however, been three cases since opposed to this, namely: *Meason v. Kuine*, 67 Penn. St. 130; *Sands v. Arthur*, 84 Id. 479, and if the phrase in the opinion in *Sausser v. Steinmetz*, to the effect that either party has a right to refuse the execution of a contract relating to land, means that the vendee can set up the statute as well as the vendor; and the remark of the court is not to be regarded as qualified by the facts of the actual case before it, then we must add *Sausser v. Steinmetz*, to these decisions and dicta inconsistent with *Tripp v. Bishop*. Not one of these cases it may be noted takes any notice of *Tripp v. Bishop*, not even *Sands v. Arthur*, which probably overruled it. In *Tripp v. Bishop*, it was decided that the vendor was not prevented from recovering on the equitable ground of there being a want of mutuality of

remedy, and *Wilson v. Clark*, in which Judge Gibson brought forward the doctrine of mutuality, was distinguished. (See 16 Am. Law Reg. 642.) But in *Meason v. Kuine*, *supra*, it was suggested that the doctrine of mutuality did apply in this connection and in *Sands v. Arthur*, the rule of mutuality was made the foundation of the decision in which the plaintiff was held not to recover.

The only point of difference between *Tripp v. Bishop* and *Sands v. Arthur*, consisted in the fact that in *Tripp v. Bishop*, the conveyance tendered by the plaintiff the vendor had been accepted by the vendee; while in *Sands v. Arthur* this acceptance was refused; in neither case did the court lay any stress on the point of acceptance or non-acceptance. To settle this question, not merely must the scope of the doctrine of mutuality be determined, but also the force and effect of an acceptance as distinguished from a mere tender, and the further question considered how far a vendee is at all within the Statute of Frauds in Pennsylvania.

Now if a vendor who has tendered a deed or executed a memorandum properly signed, &c., and who sues for the purchase-money, is to fail in his action, it must be for one or more of the following three reasons: 1. Because the vendee has not, in compliance with the Statute of Frauds, signed a deed or memorandum tendered by the vendee. 2. Or because a deed or memorandum tendered by the vendor has not been accepted by the vendee. 3. Or because of want of mutuality of remedy.

As to the first, it will be shown that under 29 Car. II., such signature by the vendee may be necessary, and that if the acceptance of a deed is a substitute therefor, it must be on the ground that no action at law for the purchase-money lies until the legal title is vested in the vendee by a deed delivered and accepted, and that therefore if such signature by the vendee is necessary, it is because equity

will not specifically enforce the contract against the vendee unless the latter, as being the party to be charged under § 4 of 29 Car. II. has signed a memorandum: but that if a deed is delivered and accepted, the title being vested, the action for the purchase-money lies at law irrespective of the Statute of Frauds. Further, it will be seen that under the Pennsylvania Statute of Frauds, the 4th section being not in force, equity will not protect a vendee on the ground that he has not signed; that the vendor signing and tendering a deed has complied with the statute: and that, as in Pennsylvania, an action at law lies on an equitable title, a conveyance accepted giving a legal title, is not a prerequisite to a suit. As to the second point, it will be shown that if an acceptance of the deed tendered by the vendor is requisite, it is not so on the ground that such acceptance is required by the Statute of Frauds, which says or suggests nothing of the sort, but as has been said, is only of consequence, when owing to the rule that equity will not, under the 4th section of the Statute of Frauds, specifically enforce the contract against him, there is no other remedy except the one at law against the vendee, who by acceptance of the deed has the legal title vested in him; and that in Pennsylvania the 4th section not being in force, equity could not, if the 1st section of the statute has been complied with by a deed signed and tendered by the vendor, refuse specific performance, owing to the absence of a memorandum signed by the vendee; and, further, that an action at law lying on the equitable title, no decree in Pennsylvania for specific performance is necessary. As to the third point, it will be shown that if the plaintiff is ready to bind himself to performance of his part of the contract, as the vendor does by tender of a deed, there is no reason to apply the equitable doctrine of mutuality, which would have been relevant in case of a com-

plainant against whom in future a decree would for any reason have been impossible. And even if an original want of mutuality cannot thus be dispensed with by tender, &c.; and if the absence of the 4th section of the Statute of Frauds, with its peculiar phraseology, "the party to be charged," leaves the doctrine of mutuality (which on the strength of these words has in England been held not to apply to cases under the statute) to prevail in Pennsylvania in full force, then the execution of a deed or memorandum at any time before action, being a full compliance with the statute by the vendor, there is no failure of remedy as against him.

I. *The application generally of the Statute of Frauds to the vendee of land.* To state these propositions at greater length, we have following. The 4th section of the Statute of Frauds, requiring a contract for the sale of land to be in writing and signed by the party to be charged, &c., was deliberately omitted from the Pennsylvania Statute of Frauds. And if the addition of the 4th section of the Statute of Frauds was regarded as necessary to protect the vendee of land, it is a strong argument that the words of the 1st section were insufficient for that purpose, and the deliberate omission of the 4th section from the Pennsylvania Statute of Frauds, is a proof that vendors only were to be protected by the statute, and that a parol contract is sufficient to bind a vendee to the payment of the purchase-money. The 1st section, which was retained, requires, in order that the title to the land should pass, that a writing signed by the party making or creating the estate should be executed.

It has been settled in Pennsylvania that parol contracts for the sale of lands are valid so far as they do not pass the title in the land, to accomplish which a compliance with the first section of the Statute of Frauds is necessary. Therefore

a vendee can be held, so far as any provision of the Statute of Frauds requiring an instrument or writing on his part is concerned, if the vendor has, in compliance with the first section, signed a writing, &c.

If where section 4th is in force is meant by the party to be charged the party defendant in the action, no action will lie in law or equity for the purchase-money where a memorandum has not been signed by the vendee. And, therefore, if such action will lie against a vendee who has not signed, but who has accepted a deed, we have a manifest exception to the general rule for which we must account : *vide infra*. If, on the other hand, the 4th section of the Statute of Frauds is not in force, or by the party to be charged is meant only the vendor (the statute protecting landed interests only), then the vendee can be held on a parol contract for the sale of land if the vendor has signed a memorandum or executed a deed in accordance with the first section. Whether such deed or memorandum must be accepted by the vendee is next to be considered.

II. *The necessity of tender by the vendor, or of tender by the vendor and acceptance by the vendee of a writing signed, &c., in compliance with section first of the Statute of Frauds.* As a preliminary matter it is to be ascertained on what ground an action for the purchase-money will lie when a deed has been accepted by the vendee who has not complied with the rule, supposing it to be such, under 4th section of the Statute of Frauds, requiring a memorandum signed by him.

If the vendee has accepted the deed the legal title at common law passes. And it cannot now be contended that an action for purchase-money will not lie on parol evidence against a vendee, who is the holder of the legal title, on the part of a vendor whose property he has, because this is not enforcing any

contract relating to land, or in any way affecting the title. If the contract is not fully executed by the vesting of the title in the vendee, but remains executory, and the aid of equity is necessary, the state of the case is different. For if no legal title is vested in the vendee by a conveyance accepted, and the vendor cannot sue at law on an equitable title, the latter must first establish his title in equity, and have a legal title decreed to be made before he can recover the purchase-money. But where the contract is executory, and requires enforcing, equity may hold, and has held in England that under the 4th section it will require a written memorandum signed by the vendee, inasmuch as such vendee is clearly a party who is being sought to be charged, and the interest is one relating to land, inasmuch as the title has not yet been executed under the contract. Where the title has been so executed by a conveyance, the vendor's bill would be dismissed, as he could not require the aid of equity, having a ripe claim at common law, irrespective of the Statute of Frauds, for the money consideration. As in Pennsylvania, the 4th section is not in force, specific performance in equity could not be refused on the ground that the vendee had not signed a memorandum, &c. And an action at law lying upon the equitable title in Pennsylvania it is not necessary, apart from the statute, that the acceptance by the vendee of the conveyance should be decreed before the action will lie. Now the next question is, whether such acceptance is necessary under the statute, or generally is it necessary in any way to perfect the equitable title?

If where a deed is accepted the action lies against the vendee for the purchase-money, it must be because either (1) the statute requiring a memorandum signed by the party to be charged has been complied with ; or (2) because such tender and acceptance is equitable

part performance; or (3) because the transaction is fully performed by the tender and acceptance; or (4) because the transaction being for purchase-money and not for land, the statute does not apply, as not protecting in this connection the liability for the purchase-money merely. The first of these reasons cannot be the one for the acceptance of the deed is an act *in pais* and provable by parol, and therefore no compliance with the enactment requiring a memorandum signed by the party to be charged. The vendee under the 4th section of the statute being regarded in equity as the party to be charged, and therefore the one whose signature is necessary. It is not for the second reason, because equitable part performance goes on the ground of fraud, and says where the vendee has taken possession of the land or has spent money upon it, that a refusal of the legal title is a fraud on the vendor's part. It must therefore be for one or both of the remaining reasons, i. e., that the contract is fully executed so far as the statute is concerned, by the vesting of the title to the land in the vendee by his acceptance of the deed, and because the statute does not apply to the suits for the purchase-money merely.

When, therefore, a title in the land, such as the law recognises, either legal or equitable, is vested in the vendee, an action for the purchase-money will lie notwithstanding the Statute of Frauds. Now in Pennsylvania there is no provision of the Statute of Frauds requiring the vendee to sign a memorandum, and a compliance with the first section by the vendor will vest a good equitable title in the vendee. Equity, therefore, if the first section has been complied with, will if necessary, order the legal title to be perfected. If equity dismisses a bill on such an occasion, it would only be on the ground that an action at law for the purchase-money will lie in Pennsylvania on an equitable title,

and that this is an adequate remedy. The next question is, what is a compliance with the first section of the Statute of Frauds. A vendor only in Pennsylvania need sign the writing or deed, and a parol contract for the sale of land between the vendor and vendee has always been held valid, when it did not have the effect of passing the title in land. Therefore, if the vendee, &c., is not to be held when the deed or writing has been executed by the vendor, it must be on the ground that the law requires a tender of such deed or writing by the vendor, or both a tender by the vendor and acceptance by the vendee. A deed or writing must be tendered, if tender is necessary, on the ground that while tender may be a mere ceremony when the vendee has announced his intention not to accept the deed, &c., yet that tender is a usual and proper mode of satisfying the court that such execution of a deed or writing as the statute requires, has taken place, and because a deed, &c., executed and kept by the vendor, is not to be recognised by the law as existing at all; non-execution or execution unknown to the law not satisfying the requirements of the statute.

Whether such tender must be made before action brought is a distinct question not now taken into consideration.

An acceptance can only be necessary on the ground that without it no equitable title passes, for if an equitable title passes, the remedy at law can be had either directly, as in Pennsylvania, or can be furnished by a proper decree in equity. An acceptance of deed or writing to give an equitable title if necessary is so, either as required by common law or by the Statute of Frauds. A. At common law an equitable estate or use or trust can be created or transferred by parol, under a contract upon a sufficient consideration, neither deed or writing accepted or unaccepted being required. When chancery before the

Statute of Frauds was passed required a written memorandum, this was in favor of vendors only, so as not to pass land upon verbal evidence. B. Under the Statute of Frauds, acceptance must be necessary either (1) as required expressly or by plain deduction from the general language of the statute, or (2) as being necessary to constitute a writing, signed by the party making or creating the estate, which is required by sect. 1 of statute, or on the ground that by this section, not merely a writing, but a deed is required, and a deed to be such, must be delivered and of delivery acceptance, is an essential feature.

I. There is no suggestion of this requirement in the express language of the statute. As to the second consideration, it is clear that while to charge a party who is within the statute, a writing must have been executed by him and accepted by the other; because, if the plaintiff had refused the writing, it would indicate on his part a disclaimer of the transaction, and would show if the defendant subsequently withdrew his offer that no meeting of minds had taken place, or that both parties had refused the contract; yet, that a defendant who can legally bind himself by a parol contract, and who having done so can prevent a plaintiff who alone is referred to in the Statute of Frauds from complying with that statute is absurd. There can be no valid refusal therefore, by the vendee, a party not within the statute to accept a deed or writing signed and tendered by the vendor, the only party affected by the statute, such tender being a full compliance by the vendor with all that the statute required of him, for he cannot make the vendee accept.

It should be said also that a deed not yet made such by being delivered, may yet be a full compliance with the Statute of Frauds. If the above propositions are incorrect, then the statute by implication substitutes one parol act for another; while a vendee who would

have been bound at common law, is not bound by his parol contract, for which a signed writing or deed is tendered him, yet he is bound in equity by another parol act, viz., the acceptance of the deed or writing. It has been shown that the acceptance of a deed is valid to bind the vendee, and take the case out both of the 1st and 4th sections of the Statute of Frauds, not because such acceptance is required by the statute, but because this vests a legal title at common law in the vendee, and the latter, though he is the party sought to be charged, is no longer even under section four protected from an action on a parol agreement to pay the purchase-money; and where therefore no such acceptance is necessary at common law to pass an equitable title, and such title has vested by the contract without any such acceptance, it is not to be supposed that by inference the statute intended to make new requirements in the case of a party not even remotely referred to therein. If the equitable title in Pennsylvania therefore is vested in the vendee, owing to the fact that the 4th section does not stand in the way and an equitable title can be made the subject of an action at law, an action for the purchase-money lies as plainly on such a title as it does on a legal title when a conveyance has been accepted for this latter lies even when the 4th section has not been complied with; the case in Pennsylvania is all the stronger, inasmuch as the 4th section is not law there at all. Whether the writing signed by the vendor, &c., under the 1st section of the Statute of Frauds, the only one relating to land in force in Pennsylvania, means a memorandum of the agreement only, or whether a writing under seal in the nature of a conveyance is required, is the question which, so far as what instrument is necessary to pass the legal title, has been decided in New Jersey and other states in favor of requiring a conveyance, while illogically

perhaps, it has been assumed in Pennsylvania that a mere writing signed, though not sealed, will pass the equitable title from the vendor to the vendee. The argument is, however, strong that the statute did not relax any requirement of the common law, but in addition to these required by its first section a deed (except in the case of lease where it has been held not without doubt that a mere writing was enough), and by the fourth section a writing signed.

It having been held that a writing signed, though not sealed, is a compliance with the Statute of Frauds in Pennsylvania, a deed signed and tendered is of course such a memorandum, and will pass the equitable title, though as it is not delivered it does not pass the legal title, and though acceptance being part of delivery, acceptance is necessary to pass the legal title, and though a deed if it were required by the first section to pass the equitable title would have to be accepted to be a deed. It is believed therefore that any rule laid down by the courts requiring evidence of the acceptance by the vendee of the writing signed by the vendor, while expedient possibly as satisfying the court, is not called for by any rule of law. The vendee is bound by his original parol contract, and the vendor by executing and tendering a deed or writing complies with every requirement of the first section of the Statute of Frauds, since that section has been held in Pennsylvania not to require a deed.

III. *The Doctrine of Mutuality of Remedy.* The doctrine of mutuality of remedy in equity does not apply when the plaintiff tenders full performance of his part of the contract, because the reason of the rule is that should the plaintiff's prayer be granted, it may not be possible to afterwards compel the plaintiff to fulfil his obligation to the defendant, and if the plaintiff disposes of this difficulty by tendering perform-

ance of his part, there is no substantial ground left for the objection, especially as the whole matter lies in the chancellor's discretion.

In the present case the plaintiff does this when he tenders a deed signed by him. Therefore the defendant, the vendee, under a parol sale of land, cannot refuse, on this plea of mutuality, to pay the purchase-money when the vendor so tenders the deed.

If on the other hand, the doctrine of mutuality is wider than this, and is not disposed of by the tender of performance and negatives in every case, a recovery, if the remedy were unilateral in the original contract, and is not satisfied by the removal of this feature through an offer of performance by the plaintiff who voluntarily performs that which he could not have been compelled to perform; and if the memorandum, as is settled law, need not be executed at the time of the contract made; and the law in Pennsylvania requires no signature to any deed or writing on the part of the vendee. Then a vendor at any time may sign a memorandum or execute a deed, and having thus complied with the law, the vendee's parol contract being sufficient under the Statute of Frauds, there is complete mutuality of right and remedy. Conclusion. The result of all this is, that in every case a lessor or vendor in Pennsylvania under a parol contract, if he makes or tenders a deed or writing signed, can recover the purchase-money, even though acceptance be refused by the vendee, inasmuch as the latter is bound by his parol contract which is valid for all purposes except to pass title, and as the title is passed by the vendor's compliance with the 1st section of the Statute of Frauds.

Whatever doubt there may be as to the necessity of acceptance by the vendee, there can be no doubt that the doctrine of mutuality does not apply in this connection, and that no execu-

tion of any deed or writing is required on the vendee's part. *Sands v. Arthur*, therefore, if to be supported, must be so on a ground not taken by the Supreme Court that, viz., of non-acceptance by the vendee of the deed or writing tendered by the vendor. And the remark in *Sausser v. Steinmetz*, that either party may decline to carry out a parol contract relating to land must be confined to the facts in the particular case, where the vendee had failed to comply with the statute; if not so qualified this doc-

trine can only be correct where the vendee has refused to accept. In other words, *Sands v. Arthur* must be rested on the doubtful basis of non-acceptance or be regarded as bad law, and the general remark in *Sausser v. Steinmetz*, be limited to the cases where the vendor has not tendered a deed or writing, or be extended at the furthest to those where although the vendor has tendered a deed or writing, the vendee has refused to accept it.

H. R.

Supreme Court of the United States.

THE NORTHWESTERN UNIVERSITY v. THE PEOPLE.

The expression in a constitution or statute exempting from taxation property, "necessary for school purposes," is more extensive than "for the use of schools." The former includes property which is not itself in actual use by the school, but which by being rented produces an income that is applied to the support of the school.

The fourth section of the Amendatory Charter of 1855, of The Northwestern University, provides "that all property of whatever kind or description belonging to or owned by said corporation shall be for ever free from taxation for any and all purposes." Sect. 3, art. 9, of the state constitution of 1848, of Illinois, in force when said amendment was made, provided that "the property of the state and counties, both real and personal, and such other property as the General Assembly may deem necessary for school, religious and charitable purposes may be exempted from taxation." Sect. 3, art. 9, of the state constitution of 1870, provided that "the property of the state, counties and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law;" and the revenue act of 1872, passed thereunder, exempted "all property of institutions of learning, including the real estate on which the institutions are located, not leased by such institutions or otherwise used with a view to profit." The Supreme Court of Illinois in this case, *held* (80 Ill. 330): That the above-quoted section of the constitution of 1848 did not authorize the exemption from taxation of property owned by educational, religious or charitable corporations, which was not itself used directly in aid of the purposes for which the corporations were created, but which was held for profit merely, notwithstanding the profits were to be devoted to the proper purposes of the corporation. Upon error to the Supreme Court of the United States, *held*, that, the language of the constitution of 1848, being, that the legislature might exempt from taxation "such property as they might deem necessary," not for the use of schools, but "for school purposes," lands held by the university for sale or lease, the profits to be devoted to the use and support of the university, were held for school purposes

within the meaning of the constitution of 1848 : that this construction necessarily becomes a part of the legislative contract made by the Amendatory Act of 1855, and that said act having been accepted by the university, and investments made on the faith of it, the obligation of the legislative contract thereby completed was impaired by the provisions of the constitution of 1870, and the revenue act of 1872, above quoted, and the judgment of the Supreme Court of Illinois was accordingly reversed.

ERROR to the Supreme Court of Illinois. The facts are stated in the opinion.

Wirt Dexter and *M. Carpenter*, for plaintiff in error.

James K. Edsall and *C. H. Willett*, for defendant in error.

The opinion of the court was delivered by

MILLER, J.—This is a writ of error to the Supreme Court of Illinois, bringing before us a judgment of that court, holding that certain property of the plaintiffs was liable to taxation, which was resisted on the ground that it was exempt by a legislative contract. The university was incorporated by an act of the legislature of Illinois, approved January 28th 1851, which contained the powers necessary to its usefulness as an institution of learning, and among other provisions, authorized it to purchase and hold real estate to the extent of two thousand acres of land, and receive gifts and devises of land above that amount, which must be sold within ten years. In 1855 the legislature, by an amendment to this charter, appointed three additional trustees and enlarged its powers in some respects not very important. But the fourth section of that act is the one supposed to contain the contract on which this case must be decided. It reads thus : “That all property of whatever kind or description belonging to or owned by said corporation shall be for ever free from taxation for any and all purposes.” The state constitution of 1848, in force when the charter and amended charter above cited were enacted, declared that “the property of the state and counties, both real and personal, and such other property as the General Assembly may deem necessary for school, religious and charitable purposes, may be exempt from taxation.” The record shows a very large list of lots and lands in Cook county, which the plaintiff asserted to be free from taxation under the law, but which were listed for the taxes of the year 1874, and about to be sold for their non-payment. By proper judicial proceedings the question came before the Supreme Court of the state, which held that they were liable to be so taxed.

A motion was made some time before the case was reached for

argument in this court, to dismiss it for want of jurisdiction, and was overruled; but the attorney-general of Illinois reserves the objection now in connection with the main argument. This question of jurisdiction to reverse the judgments of state courts is so frequent, and the principles which govern it so well settled, that we need not be very elaborate in our opinion on that point. The argument is that the judgment of the state court is limited to a construction of the fourth clause of the amendatory charter of 1855, as it is affected by the constitution under which it was enacted, and that whether that statute was a contract or not, and whether it was properly construed or not, it is still but the decision of a court construing a contract or a statute, and there is no law of the state impairing the obligation of that contract within the meaning of the constitution of the United States. If this were true in point of fact the conclusion would be sound, as we have repeatedly held in this court: *Railroad Co. v. Rock*, 4 Wall. 177; *Railroad Co. v. McClure*, 10 Id. 511; *Knox v. Exchange Bank*, 12 Id. 379. But the premises assumed are not justified by the facts. The general revenue law of Illinois, prior to the amendment of 1855 to plaintiff's charter, contained nothing which exempted its property from taxation. When that act was passed it became a part of the law of the state governing taxation as applicable to the property of the university. The law remained in this condition until the state adopted a new constitution in 1870, the part of which relating to this subject is in these words: "The property of the state, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation, but such exemption shall be only by general law."

In order to conform the law of the state on the subject of taxation to this provision of the new constitution, the legislature revised its revenue laws in 1872, and in this statute the exemption established was, first, all lands donated by the United States for school purposes not sold or leased, all public school-houses, all property of institutions of learning, including the real estate on which the institutions are located, not leased by such institutions or otherwise used with a view to profit; second, all church property actually and exclusively used for public worship, when the land (to be of reasonable size for the location of the church building) is owned by the

congregation. It was under this law the local officers proceeded in assessing plaintiff's land for taxation, and it was their construction of this law which was sustained by the Supreme Court. If, therefore, the legislation of 1855 was a contract which exempted the property in question from taxation, and by the law of 1872, as construed by the Supreme Court, it is held liable to taxation, it is manifest that it is the law of 1872 and the constitution of 1870 which impairs the obligation of the contract, however the court by an erroneous construction of that contract, was led to hold otherwise. It is strenuously insisted that these provisions of the constitution of 1870 and the revenue law of 1872 do not repeal the exemption as established by the 4th section of the amended charter of 1855, because that section was in excess of the authority conferred by the constitution of 1848. But this depends on the construction of that contract as affected by the constitution under which it was enacted. If, by virtue of that constitution, the legislature of that day could only exempt plaintiff's real estate so far as it was in immediate use for school purposes, as was held by the Supreme Court, then it may not repeal that statute or impair that contract, for the exemption will probably amount to the same thing under either statute. But if it is a contract, as is contended by plaintiff's counsel, which, under a true construction of the constitution of 1848 exempts all property of plaintiff which is held by it for appropriation to the purposes of the university as an institution for teaching, and which is held for no other purpose whatever, and which can as effectually promote this purpose by leases, of which the rent goes to support the school, as in any other way, then the law of 1872 and the constitution of 1870 do, to the extent of the difference arising from these two constructions, impair the obligation of the contract of 1855. Whether that contract is such as to be impaired by these later laws is one of the questions of which this court always has jurisdiction: *Jefferson County Bank v. Skelly*, 1 Black 436; *Bridge Proprietors v. Hoboken*, 1 Wall. 144; *Delmas v. Insurance Co.*, 14 Id. 668.

The Supreme Court of Illinois in its opinion found in the record appears to concede that the Act of 1855, to the extent that it was authorized by the state constitution, was a contract. "It is not claimed," says the court, "that the appellant is in any sense a public corporation, but it is claimed that the purpose for which it is created is so far beneficial to the public that it affords a sufficient

consideration for the grant of exemption from taxation in the amendment, and that when the amendment was accepted and acted on by the corporation, it must be held a vested right which cannot be withdrawn by subsequent legislation because of the provision of the constitution of the United States which prohibits a state from passing a law impairing the obligation of a contract. If it was competent for the General Assembly to make the exemption, we are not disposed to contest the correctness of this position, but if it was not competent to make the exemption, the attempt was a nullity, and the case is not affected by the constitution of the United States." The court thus concedes that there was a contract, so far as the legislative powers extended. It is possible if that question had been fully investigated and all the facts necessary to decide it were before the court, it might not appear that all the lands subjected to taxation by the judgment of the Supreme Court were bought after the date of the amended charter or donated on the faith of that exemption; but it does appear, by a stipulation made for that purpose, that since the granting of said amended charter the corporation has expended in the erection and purchase of buildings, apparatus and other facilities and appliances for education and promotion of the objects stated in and contemplated by the act of incorporation, over \$200,000, realized from donations and the sale of lots and lands, and has built up a university, with several departments of learning, in which more than five hundred students are taught the higher branches of learning. It is perhaps a fair inference from this statement, and in deference to the ruling of the Supreme Court, that there was such acceptance of this Act of 1855, and such investments made on the faith of it, that at least some portion of the property now in question is protected by contract if the exemption clause lawfully covers it. It will readily be conceded that the language of the fourth section of the Act of 1855 is broad enough for that purpose: "All property, of whatever kind and description, belonging to or owned by said corporation, shall be for ever free from taxation for any and all purposes." But the argument is that since the constitution then in force only permitted the legislature to exempt from taxation the property, real and personal, used by the university in immediate connection with its function of teaching, the statute must be limited to property so used. This was the view taken by the Supreme Court of the state. "By the language of the constitution," says the court, "while a

discretion is conferred on the General Assembly whether to exempt or not, and, if it shall determine to exempt the amount of the exemption, it is clearly restricted in the exercise of this discretion to property for schools and religious and charitable purposes. Property for such purposes, in the primary and ordinary acceptance of the term, is property which in itself is adapted to and intended to be used as an instrumentality in aid of such purposes. It is the direct or immediate use and not the remote or consequential benefit to be derived through the means of the property that is contemplated."

Though the court is here construing the constitution of its own state, and is therefore entitled to our consideration on that ground, as well as the court's character and standing for learning and ability, we find ourselves in the performance of the duty of reviewing this case, compelled to differ from that court in the nature and extent of the constitutional limitation of this contract, as made by the legislature of the same state; for this constitution necessarily becomes part of the contract which is said to be impaired by subsequent legislation. The first observation we have made is that the constitution does not say "property used for schools," as the opinion of the court implies. Neither the important word "use" or "schools" is found in the third section of the instrument on that subject. If the language were that the legislature might "exempt property for the use of schools" we should readily agree with that court. Indeed, that would be the appropriate language to convey the idea on which the court rests its decision. The makers of the constitution, however, used other language because they had another meaning, and did not use that because they did not mean that. They said that the legislature might exempt from taxation "such property as they might deem necessary," not for the use of schools but "for school purposes." The distinction is, we think, very broad between the property contributing to the purpose of a school made to aid in the education of persons in that school, and that which is directly or immediately subjected to use in the school. The purposes of the school and the school itself are not identical. The purpose of a college or university is to give youth an education. The money which comes from the sale or rent of land dedicated to that object aids this purpose. Land so held and leased is held for school purposes in the fullest and clearest sense. A devise of a hundred acres of land "to the president

of the university for the purpose of the school," would be not only a valid conveyance, but if the president failed to do so a court of chancery would compel him to execute the trust; but if he leased it all for fair rent and paid the proceeds into the treasury of the corporation to aid in the support of the school, he would be supported as executing the trust. When the constitution, in 1870, came to be reconstructed, its framers had learned something about exemption from taxation, as we shall see by placing the revision in that constitution alongside that of 1848 on the same subject, as follows: 1848—"The property of the state and counties, both real and personal, and such other property as the General Assembly may deem necessary for school, religious and charitable purposes may be exempt from taxation." 1870—"The property of the state, counties and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation. But such exemption shall be only by general law." Here it is only such property as may be exclusively used for school purposes that may be exempt, and this only by a general law. The general law passed in 1872, to give effect to this change in the constitution, exempted only "the real estate on which the institutions of learning are located, not leased by such institutions or otherwise used with a view to profit." This is what the Supreme Court say was meant by the constitution of 1848, but if it was it took a deal of change in the language when the framers of the new constitution and of the new tax law came to express the same idea. We cannot come to the conclusion that they intended to mean the same, but that the later law was designed to limit the more enlarged power of the earlier one. If our construction of the constitution of 1848 is sound, the judgment of the Supreme Court must be reversed, for the stipulation of facts on which the case was tried says, that "it is admitted that all the lots and lands mentioned and described in the objections filed in said proceeding for judgment, whereon said taxes are levied, excepting improvements in the same, are leased by said university to different parties for different parties for a longer or shorter period, and that all said lots and lands are held for sale or lease for the use and support of said institution, and the objects contemplated by said charter." We are of opinion that such use and such holding bring them within the class of property which

by the constitution of 1848, the legislature could, if it deemed proper, exempt from taxation, and that the legislature did so exempt it. The judgment of the Supreme Court of the state is reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

Mr. Justice STRONG did not sit in this case.

The importance of the principal case in its bearing upon the property interests of educational, charitable and religious corporations in the state of Illinois, can hardly be over-estimated; but while the friends of higher education and of the institution of learning whose interests are involved in this case, can not but rejoice at the conclusion arrived at by the learned court, it will not, it is hoped, be regarded as presumptuous to examine some of the cases heretofore decided, and state some of the principles therein laid down, bearing upon the general topic of exemptions from taxation, with a view to examining the grounds of this decision.

It is settled that charters of incorporation, except in the case of municipal corporations, constitute contracts between the state and the corporators, the obligation of which may not be impaired by legislative action alone, unless the right so to do is reserved by the state, either in the charter or by statutory or constitutional provision. *Dartmouth College v. Woodward*, 4 Wheat. 518; *Planters' Bank v. Sharp*, 6 How. 301; *Trustees of Vincennes University v. Indiana*, 14 Id. 268; *Scotland Co. v. M., I. & N. Railway Co.*, 65 Mo. 123; *Cooley's Const. Lim.* 126, 279, and cases there cited; *Burroughs on Taxation* 109.

It is also settled upon the authority of the decisions of the Supreme Court of the United States, that a state may by contract to that effect, founded upon a consideration, exempt the property of an individual or corporation from taxation for any specified period, or even

permanently, and also, as it seems, that where a charter containing an exemption from taxes or an agreement that the taxes shall be to a specified amount only, is accepted by the corporators, the exemption is presumed to be upon sufficient consideration, and consequently binding upon the state. *Cooley's Const. Lim.* 12, 280; *Cooley on Taxation* 53; *Blackwell on Tax Titles* 407; *Gordon v. Appeal Tax Court*, 3 How. 133; *New Jersey v. Wilson*, 7 Cranch 164; *Piqua Branch Bank v. Knoop*, 16 How. 369; *Ohio Life Ins. Co. v. Debolt*, 16 Id. 432; *Dodge v. Woolsey*, 18 Id. 331; *Mechanics' and Traders' Bank v. Debolt*, 18 Id. 381; *Mechanics' and Traders' Bank v. Thomas*, Id. 384; *Jefferson Branch Bank v. Skelly*, 1 Black 436; *Erie Railroad Co. v. Pennsylvania*, 21 Wall. 492; *Scotland Co. v. M., I. & N. Railway Co.*, *supra*. See, however, the last proposition of the above rule criticised in *Burroughs on Taxation* 116, where the subject of the consideration necessary is fully considered. See, also, *Cooley on Taxation* 54; *Tucker v. Ferguson*, 22 Wall. 527; *West Wis. Railroad Co. v. Supervisors*, 93 U. S. 595.

The rule that a state may by contract preclude itself from the future exercise of the right of taxation, though, as above stated, settled upon authority, has, however, met with strenuous opposition at the hands of some of the state courts and of the dissenting judges of the Supreme Court of the United States. See *Toledo Bank v. Bond*, 1 Ohio St. 622; *Mechanics' & Traders' Bank v. Debolt*, Id. 591; *Knoop v. Piqua Bank*, Id. 603; *Milan, &c., Plank Road Co.*

v. Husted, 3 Id. 578; *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 69; *Brewster v. Hough*, 10 Id. 143; *Backus v. Lebanon*, 11 Id. 24; *Thorpe v. R. & B. Railroad Co.*, 27 Vt. 140; *Brainard v. Colchester*, 31 Conn. 410; *Mott v. Penna. Railroad Co.*, 30 Penn. St. 9; *East Saginaw Salt Manufacturing Co. v. East Saginaw*, 19 Mich. 259; *West Wisconsin Railroad Co. v. Supervisors*, 35 Wisc. 265; *Attorney-General v. Chicago, &c., Railroad Co.*, Id. 572; *Washington University v. Rouse*, 8 Wall. 441, per MILLER, J.; Blackwell on Tax Titles 408; Burroughs on Taxation 109, *et seq.* And were the question now to arise for the first time, it would deserve great consideration whether upon principle it ought not to be settled otherwise. See the authorities last above cited. The general rule unquestionably is, as stated by Blackstone (1 Bl. Com. 90), that "Acts of Parliament derogatory to the power of subsequent Parliaments, bind not." With reference to the same subject, Judge COOLEY, in his learned work on Constitutional Limitations (p. 283), says: "It would seem, therefore, to be the prevailing opinion, and one based upon sound reason, that the state cannot barter away, or in any manner abridge or weaken, any of those essential powers which are inherent in all governments, and the existence of which in full vigor is important to the well-being of organized society; and that any contracts to that end, being without validity, cannot be enforced because of any supposed conflict with the provision of the national constitution now under consideration (with reference to laws impairing the obligation of contracts). If the tax cases are to be regarded as an exception to this statement, the exception is, perhaps, to be considered a nominal rather than a real one, since taxation is for the purpose of providing the state a revenue, and the state laws which have been enforced as contracts in these cases have

been supposed to be based upon consideration, by which the state receives the benefit which would have accrued from an exercise of the relinquished power in the ordinary mode." See also Cooley's Const. Lim. 125; Cooley on Taxation 52.

It is believed that it is beyond the power of the legislature to alienate the police power of the state, even by express grant, and even though the grant is founded upon a consideration. See *Thorpe v. R. & B. Railroad Company*, 27 Vt. 149, per REDFIELD, C. J.; Cooley's Const. Lim. 283, and cases there cited. And also that by the better opinion, the legislature cannot by contract or grant preclude itself from the future exercise of the right of eminent domain. See Cooley's Const. Lim. 281, 282, and authorities there cited. If any comparisons were to be instituted as respects their relative importance to the existence and well being of the government of a state, between the police power or the right of eminent domain on the one hand, and the right of taxation on the other, it would certainly not be unfavorable to the latter, without the exercise of which neither of the former powers could be exercised. And upon principle, it is believed that no distinction whatever can be made between an alienation of the one, and an alienation of the other, and that both, unless in terms authorized by the constitution, ought to be held equally opposed to public policy and void.

As respects the argument above quoted from Cooley's Const. Lim., that in the tax cases, the contracts are supposed to be based upon consideration, &c., it is believed that this affords no satisfactory grounds for the exception. In nearly, if not quite, all the cases of exemption by legislative contract founded on an alleged consideration (the cases of exemptions of the property of school, charitable and religious corporations may be supported on other grounds,

viz., of public policy), such consideration will, so far as it is available for purposes of revenue, the great object of taxation, be found to be illusory, and at best merely nominal, and as the legislature must be the judges of the adequacy of the consideration offered, grounds of public policy would seem sufficient to warrant the total denial of their right to exercise so dangerous a power, unless authorized, and then only to the extent authorized by the constitution under which they are elected. See, however, *Scotland Co. v. M., I. & N. Railroad Co.*, 65 Mo. 123, where it was held that the taxing power may be alienated by contract, where there is no constitutional provision inhibiting it; also cases cited, *ante*.

Conceding then, that it is settled by authority that a state may by contract founded on a consideration, preclude itself from the exercise of the right of taxation upon property of an individual or corporation, we come to the consideration of some of the rules by which grants of exemption are to be construed.

Taxation being the rule, and exemption from taxation the exception, the rule is well settled that statutes creating exemptions from taxation should be strictly construed, and not be extended beyond their terms. The intention to exempt must, in order to be effectual, be expressed in clear and unambiguous terms. Every presumption is against the exemption: Burroughs on Taxation 113, 132; Cooley on Taxation 54, 146; Cooley on Const. Lim. 281, note; 514, note; Blackwell on Tax Titles 409. These principles are illustrated by a large number of cases too numerous to be here cited, but which will be found collected by the authors above referred to. As an example, the rule may be stated that, although the power to levy a special assessment can only be justified as an exercise of the taxing power: Cooley on Taxation

147, 148; *People v. Mayor, &c., of Brooklyn*, 4 N. Y. 419; *State v. Mayor, &c., of Newark*, 35 N. J. Law 168; *Motz v. Detroit*, 18 Mich. 495; *Weeks v. Milwaukee*, 10 Wis. 242; *Glasgow v. Rouse*, 43 Mo. 489; *Chambers v. Satterlee*, 40 Cal. 497; *Emery v. Gas Co.*, 28 Id. 346; *Reeves v. Treasurer of Wood Co.*, 8 Ohio St. 333; *Pray v. Northern Liberties*, 31 Penn. St. 69; *Baltimore v. Cemetery Co.*, 7 Md. 517; *McComb v. Bell*, 2 Minn. 295; it is well settled that an exemption of property from taxation in general terms, will not be held to exempt it from special assessments for local improvements. See matter of *Mayor, &c., of N. Y.* 11 Johns. 77; *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 506; *City of Patterson v. Society*, 24 N. J. Law 385; *Northern Liberties v. St. John's Church*, 13 Penn. St. 104; *Broadway Baptist Church v. McAtie*, 8 Bush 508; *Second Universalist Society v. Providence*, 6 R. I. 231; *Baltimore v. Cemetery Co.*, 7 Md. 577; *Le Fevre v. Detroit*, 2 Mich. 586; *First Presbyterian Church v. Fort Wayne*, 36 Ind. 338; *Canal Trustees v. Chicago*, 12 Ill. 403; *St. Louis Public Schools v. St. Louis*, 26 Mo. 468; *La Fayette v. Orphan Asylum*, 4 La. Ann. 1; *Boston Seamen's Friend Society v. Boston*, 116 Mass. 181; *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155. In *Baltimore v. Cemetery Co.*, *supra*, the terms of the exemption were from "any tax or public imposition whatever," but this was held not to exempt the cemetery from an assessment for paving the street in front of the premises. *Buffalo City Cemetery v. Buffalo*, *supra*, is even stronger. In that case the exemption was in terms from "all public taxes, rates and assessments," and yet this was held not to apply to a municipal assessment to defray the expenses of a local improvement, the adjective "public" being considered as applying to the nouns "rates," and "assessments," as well as to the noun "taxes." See also *Patter-*

son v. Society, *supra*; *State v. Newark*, 27 N. J. Law 185; *Bridgeport v. N. Y. & N. H. Railroad Co.*, 36 Conn. 255, where the exemptions were also very general in their terms. See, however, *Harvard College v. Boston*, 104 Mass. 470, where a special assessment for altering a street, was considered a civil imposition within the meaning of an exemption of college property from "all civil impositions, taxes and rates."

Applying the rule that statutes creating exemptions are to be construed strictly, to the case of educational, charitable and religious corporations employing some portion of their means in the purchase of property not required nor directly used for the purposes for which their corporate privileges were conferred, though capable of being made useful and profitable as an aid in their corporate purposes, the general inclination of the courts seems to be to hold, as was held by the Supreme Court of Illinois in the principal case (though, as it seems, upon an inaccurate view of the language of the state constitution), that an exemption of property used or occupied for such purposes would not exempt from taxation property held by the corporations for mere purposes of profit, but not used directly for the purposes for which they were incorporated. See the cases cited by the Supreme Court of Illinois, when the principal case was before them, in 80 Ill. 336; *Cooley on Taxation* 150, 151; *Proprietors v. Lowell*, 1 Met. 538; where an exemption of "all houses of religious worship, and the pews and furniture within the same," was held to exempt only that part of a building occupied for religious worship, and not other portions leased for business purposes: *Orr v. Baker*, 4 Ind. 86; *Washburn College v. Commissioners*, 8 Kan. 344; *First M. E. Church, v. Chicago*, 26 Ill. 482; *Wyman v. St. Louis*, 17 Mo. 335; *Pierce v. Cambridge*, 2 Cush. 611; *Kendrick v. Farquar*, 8 Ohio 189; *Cincin-*

nati College v. The State, 19 Id. 110; *Vail v. Beach*, 10 Kan. 214; *Morrison v. Larkin*, 26 La. Ann. 699; *Methodist Church v. Ellis*, 38 Ind. 3; *Detroit Young Men's Society v. The Mayor of Detroit*, 3 Mich. 172; *State v. Ross*, 24 N. J. Law 497; where under a statute exempting the property of "all colleges, academies and seminaries of learning," the houses and lots provided for the residence of the president, professors and stewards, as part of their compensation for their services, were held exempt; but a building owned by the college, and occupied as a grammar school, by a person paying an annual rent therefor, was held not to be exempt, although it aided the college incidentally in preparing students for the college.

Indeed, an exemption by statute in general terms, of all the property of a college or other literary institution, seems generally to extend only to property actually used by the institution for its legitimate purposes. The same rule seems to have been applied whether the exemption is in express terms, of such property only as is used for literary purposes, or whether the terms used are general; and it seems, that the use in order to come within the terms of the exemption, must in either case be directly in aid of the purposes for which the corporations were created. *Burroughs on Taxation* 134; *State v. Ross*, 24 N. J. Law 497; *State v. Elizabeth*, Id. 103; *Proprietors v. Lowell*, 1 Met. 538; *Orr v. Baker*, 4 Ind. 86. See also, the cases cited next above.

No question was made in the principal case, either in the Supreme Court of Illinois, or in the Supreme Court of the United States, but that the words of the Amendatory Act of 1855, are sufficiently broad to exempt the property in question, but the question was, whether the constitution of 1848 authorized the passage of such an exemption law. In the principal case the principle that exemptions are exceptional, and therefore

to be construed strictly, was by the Supreme Court of Illinois applied to section 3 of article 9, of the state constitution of 1848, quoted in the opinion. The Supreme Court of Illinois appear also, in the printed report of the case, 80 Ill. 334, 335, to have put their construction upon a misquotation of the section in question, which is quoted thus: "The property of the state and counties, both real and personal, and such other property as the General Assembly may deem necessary for *schools*, religious and charitable purposes, may be exempted from taxation." Again, on page 335 they say: "It [the General Assembly] is clearly restricted, in the exercise of this discretion, to property for *schools*, and for religious and charitable purposes." It is but just to state, however, that this error does not appear to have influenced their decision, for on page 336 they say: "Houses, furniture, grounds, &c., to be actually used for educational purposes, may be said to be for school purposes, &c."

No authority was cited by the Supreme Court of Illinois, for the proposition, assumed by the court, that the rule of strict construction applicable to statutes in fact creating exemptions, is applicable to a constitutional provision, not creating an exemption, but authorizing the exercise of a *discretion* by the legislature (within certain specified limits), as to exemptions to be created by the legislature; and no reason is perceived why, in construing the constitutional provision in question, the ordinary rules of construction should not be applicable, and the meaning of the provision in question be determined by the fair and natural import of the terms, and in view of the subject-matter of the provision. From this view of the case, the distinction taken between the terms "for the use of schools" and "for school purposes" will doubtless commend itself to the minds of most persons. Still it is not so obvious, but that differences of opinion might well

exist upon the question, especially in view of the authorities already cited. But there is another view of the case from which the decision of the Supreme Court of the United States seems, to the writer at least, more satisfactory, and that is, not as stated by the Supreme Court of Illinois, that, while a discretion is conferred on the General Assembly whether to exempt or not, and if it shall determine to exempt, the amount of the exemption, it is restricted in the exercise of this discretion to property for *schools*, and for religious and charitable purposes, using those terms in the narrow sense above stated; but that the intention of the provision clearly was to confer upon the legislature a broader discretion, not only as to whether to exempt or not, and, if they should determine to exempt, the amount of the exemption, but also if they should determine upon making some exemption, a discretion to determine for themselves whether any proposed exemption is necessary (using that term not in its strict, narrow sense, but more nearly in the sense in which it is used in the law with reference to the power of infants to contract for necessities), proper or appropriate for school purposes, or the ends to be accomplished by schools, which involves the determination not only of the degree of fitness for the purpose, but also to some extent whether or not the purpose is a school purpose; and, if in the exercise of their discretion they determine that the exemption in question is necessary or appropriate and proper for the advancement of the object aimed at, the aid of the schools, their decision, unless clearly evasive and colorable, is conclusive, and cannot be reviewed by the courts. See *Northwestern University v. The People*, 86 Ill. 141, 142, dissenting opinion of SHELTON and DICKEY, JJ.

Whether or not it was wise to give the legislature so broad a discretion, is not in issue, but the question is, Did the constitution of 1848 confer such a

discretion? and it seems that it did. Upon the whole then, the decision of the principal case appears to be correct, though, as it seems to the writer, it would have been more satisfactory, had

it also been based on the apparent intention to grant a broader discretion to be exercised by the legislature, and one not reviewable by the courts.

MARSHALL D. EWELL.

Supreme Court of Indiana.

THE PENNSYLVANIA RAILROAD COMPANY v. SINCLAIR, ADM.

In an action by the administrator of a decedent, against a railroad company, to recover for the alleged negligent killing of said decedent, by the servants of the defendant, while running a locomotive and train of cars across a public street in a populous part of the city, the complaint alleged, that, when the decedent was run over and killed, the defendant was running such locomotive and train "at a recklessly and grossly negligent and dangerous rate of speed, to wit, at the rate of forty miles per hour," in violation of an ordinance of such city, limiting the rate of speed to six miles per hour. *Held*, it being admitted that the decedent was guilty of contributory negligence in stepping upon the track in front of the engine, that evidence that the defendant had wilfully committed the injury is not admissible under the complaint.

Where an intent, either actual or constructive, to commit an injury exists at the time of its commission, such injury ceases to be a merely negligent act, and becomes one of violence or aggression.

Contributory negligence is a complete defence to an action for damages for a merely negligent injury. It is only when the injury sued for is alleged, in terms or substance, to have been wilfully committed, that contributory negligence ceases to be a defence.

THIS was an action by Thomas Sinclair, administrator of John Sinclair, against the Pennsylvania Company, for damages for killing the said John Sinclair.

The complaint was in two paragraphs.

The first stated, in substance, that, on October 29th 1873, the defendant was running a train of cars over the track of the Pittsburgh, Fort Wayne and Chicago Railway Company, where said track crosses Fairfield avenue, a public street in the city of Fort Wayne; that said street was in a populous part of said city, and was used by persons on foot and otherwise; that, on that day, while the said John Sinclair was passing along and upon said street and over said track, with due caution on his part, the defendant, by its servants and agents, so carelessly ran and operated said locomotive and train of cars, that the same were run upon and over the said John Sinclair, thereby causing his death.

The second paragraph set out again the same facts substantially, but averred that the defendant was running said locomotive and

train of cars "at a recklessly and grossly negligent and dangerous rate of speed, to wit, at the rate of forty miles an hour," when the said John Sinclair was run over and killed; that, by an ordinance of said city, no train of cars was allowed to be run through that city at a greater rate of speed than six miles an hour; that, by the same ordinance, it was provided that a watchman should be kept at the said crossing of said railway and said avenue, to protect persons passing along said avenue and over said railway track from danger that might result from passing trains; that the defendant had notice of the passage of said ordinance, but had failed to comply with the same.

A demurrer to each paragraph of the complaint was overruled, and the defendant answered in general denial.

The jury returned a verdict in favor of the plaintiff, assessing his damages at one thousand dollars, and judgment followed upon the verdict.

J. Brackenridge, A. Zollars and F. T. Zollars, for appellant.

R. S. Robertson and L. M. Ninde, for appellee.

The opinion of the court was delivered by

NIBLACK, J.—No question is made in the argument here as to the sufficiency of the complaint. We, therefore, assume that the demurrer to it was correctly overruled.

All the questions which we are required to consider are such as have arisen out of the causes assigned for a new trial by the defendant after the verdict, and relate principally and almost exclusively to the sufficiency of the evidence to sustain the verdict. * * * (The learned judge here reviewed the evidence.)

We think the evident inference from the evidence is, that the decedent did not exercise due care in attempting to cross the railway track, as he did when he went upon it, and that he therefore negligently contributed to the injury which resulted in his death. It is not insisted by the appellee, that the evidence justifies us in concluding that the decedent was without fault on his part. *The Terre Haute, &c., Railroad Co. v. Graham*, 46 Ind. 239; *The St. Louis, &c., Railway Co. v. Mathias*, 50 Ind. 65.

We need not, for that reason, further and more particularly refer to the evidence tending to establish the want of ordinary prudence and care on the part of the decedent. Waiving all discussion as to

whether or not the decedent was guilty of contributory negligence, the appellee contends, that it was shown upon the trial by at least a fair preponderance of the evidence, that, when the train struck the decedent, it was running at a rate of speed which, under the circumstances, amounted to such gross negligence and to such a wilful disregard of the public safety, and even human life itself, as to authorize a recovery by the appellee, under the second paragraph of the complaint, notwithstanding there may have been contributory negligence on the part of the deceased.

Those portions of the evidence which tended to show that, at the time of the accident, the train was running at a high and dangerous rate of speed, and that the decedent was struck with great force, are brought specially to our attention as sustaining that view of the evidence, but the conclusion at which we have arrived concerning the nature of the averments in the second paragraph of the complaint renders it unnecessary that we shall review that branch of the evidence.

There is a manifest want of uniformity in the authorities, in their attempts to define the precise circumstances under which a plaintiff may recover for an injury, when it is shown that he, by his negligence, contributed to the injury for which he sues, and it is to be regretted that this want of uniformity pervades some of the cases heretofore decided by this court, but we think many of the apparent differences which have arisen on this subject result more from an inapt use of words and phrases than from any difference in the ideas intended to be expressed. There has been of late a very strong tendency of judicial opinion, adverse to the distinction between gross negligence, and ordinary negligence in the sense in which those terms are used in the class of cases to which we have above referred, and with that tendency the doctrine has been gaining ground in this, and at least some of the other states, that something more than mere negligence, however gross, must be shown, to enable a party to recover for an injury, when he has been guilty of contributory negligence; that, in such a case, something more aggressive than mere negligence must be alleged and proved. Strictly speaking, negligence is a non-feasance, not a malfeasance. It is an act of omission rather than commission. In its secondary meaning, it may be said to include every omission to perform a duty imposed by law for the avoidance of injury to a person and property. Where an intention to commit the injury exists, whether that intention be actual or con-

structive only, the wrongful act ceases to be a merely negligent injury, and becomes one of violence or aggression. Shearman & Redfield's Negligence, sect. 2; Wharton's Negligence, sect. 22, *et seq.*; *The Ohio, &c., Railway Co. v. Selby*, 47 Ind. 471; *Railroad Co. v. Lockwood*, 17 Wall. 357.

When, therefore, the injury complained of is a negligent one merely, contributory negligence is a good defence to the action. It is only when the injury sued for is alleged, either in terms or in substance, to have been wilfully or purposely committed, that contributory negligence ceases to be a defence. By contributory negligence in this connection, we, of course, mean such negligence as has materially or substantially contributed to bring about the injury set up in the complaint. As a matter of evidence, proof that the misconduct of the defendant was such as to evince an utter disregard of consequences, so as to imply a willingness to inflict the injury complained of, may tend to establish wilfulness on the part of the defendant; but, to authorize a recovery on such evidence, there must be suitable allegations in the complaint to which it is applicable. The case of *The Cincinnati and Martinsville Railroad Co. v. Eaton*, 53 Ind. 307, fully sustains the views we have enunciated in this opinion.

Tested by the rules above laid down, we have come to the conclusion that the second paragraph of the complaint in this case did not do more than charge a negligent killing of the decedent, and, hence, that its allegations were not sufficient to justify a recovery over proof of contributory negligence on the part of the deceased.

We are aware that there is a line of decisions establishing what is known as the English doctrine, to the effect that the plaintiff may recover, notwithstanding his own negligence exposed him to the risk of injury, if the defendant, after becoming aware of the plaintiff's danger, could, by the exercise of ordinary care and diligence, have avoided injuring him: *Radley v. Directors of L. & N. W. Railway Co.*, Law Rep. 1 App. Cas. 754; Shearman & Redfield's Negligence, sect. 36; Wharton's Negligence, sect. 388. But we do not feel justified in disturbing what has been long accepted in this state as the better doctrine, after much discussion and consideration.

For the error of the court, in overruling the appellant's motion for a new trial, the judgment must be reversed, and the cause remanded, with instructions to grant a new trial and for further proceedings.

Court of Appeals of Maryland.

THIRD NATIONAL BANK OF BALTIMORE v. JOHN H. LANGE.

A trustee has no power to sell trust property for his own use, and one who buys from him, with actual or constructive notice of the trust, acquires no title.

A promissory note payable to A. B., trustee, is not commercial paper.

The word trustee on the face of the note shows that it was connected with a trust, and was sufficient to put a purchaser upon inquiry, and, it turning out that the trustee was selling in fraud of his trust, the purchaser acquires no title.

A subsequent endorser guarantees preceding endorsements, but where the alleged second endorsement was made before delivery, and the payee subsequently wrote his name above that of the alleged second endorser, the rule cannot apply, even in favor of a subsequent *bona fide* holder without notice, because there was, in fact, no previous endorsement at the time of the alleged second endorsement.

Parol evidence is admissible to show the character in which the alleged second endorsers stood towards the note.

THIS was an action on a promissory note by Flynn & Emrick "to the order of N. W. Watkins, trustee." The names of N. W. Watkins, trustee, and J. Regester & Sons were endorsed upon it.

This note was given for the purchase of property sold by N. W. Watkins, as trustee, under a decree of the Circuit Court of Baltimore city, and was for one of the deferred payments as authorized by that decree. At the time of its delivery to the trustee it was endorsed by J. Regester & Sons as securities for the drawers—the terms of sale requiring the deferred payments to be secured in that form.

Subsequently N. W. Watkins wrote above the names of J. Regester & Sons the endorsement, N. W. Watkins, trustee, and applied to the Union Banking Company to buy the note, offering to sell it for 12 per cent. off. The Banking Company not being willing to buy, its cashier offered to sell it for Watkins, and placed it in the hands of a bill broker; it was taken by him to the Third National Bank, the appellant, and offered to it for sale. The bank bought it from the broker at 9 per cent. off, and the proceeds were appropriated by Watkins.

Henry Stockbridge, for appellants.—This note is in regular commercial form and came to the appellant in the regular course of business, from a well-known broker. Appellant had a right to rely on the last endorsers as a guarantee of the good faith of preceding ones: 1 Daniel on Neg. Inst., sects. 769, 790, 791, 814; *Goodman v. Harvey*, 4 Ad. & E., 870; *Goodman v. Simonds*, 20

Howard 343. And see the learned note on this case in Redfield & Bigelow's Leading Cases on Bills of Exchange 257. *Dalrymple v. Hilenbrand*, 62 N. Y. Reps. 5; *Hamilton v. Marks*, 16 Am. Law Reg. N. S. 42; *Commissioners, &c. v. Clark*, 4 Otto 285; *Collins v. Gilbert*, 4 Otto (753), 757-762; *Cecil Bank v. Heald*, 25 Md. 563; *Maitland v. Citizens' Bank*, 40 Md. 540.

Albert Ritchie, Eichelberger and Clendinen, for appellees.

The opinion of the court was delivered by

BRENT, J.—Without intending to decide upon the right of a national bank to purchase paper (as the question does not necessarily arise in this case), we do not think the note in question is within the class of paper known as commercial paper, although like it in general form. The fact that it is payable to the order of Watkins, trustee, restricts its free circulation, and excepts it from some of the rules governing commercial paper.

No doctrine is better settled than that a trustee has no power to sell and dispose of trust property for his own use and at his own mere will. One who obtains it from him, or through him, with actual or constructive notice of the trust, can acquire no title, and it may be recovered by suitable proceedings for the benefit of the *cestui que trust*. If there are circumstances connected with the purchase which reasonably indicate that trust property is being dealt with, they will fix upon the purchaser notice of the trust, and if he fails to make inquiry about the title he is getting, it is his own fault, and he must suffer the consequences of his own neglect.

The general doctrine is stated in Story's Eq. Juris., sect. 400, where it is said, "for whatever is sufficient to put a party upon inquiry (that is, whatever has a reasonable certainty as to time, place, circumstances and persons) is in equity held to be good notice to bind him." A large number of authorities is referred to in the note, and it is unnecessary to allude to them more particularly.

In the case of the present note it can not be read understandingly without seeing upon its face that it is connected with a trust and is part of a trust fund. It was the duty of the bank, before purchasing it, to have made inquiry into the right of the trustee to dispose of it. But this it wholly failed to do, and as it turns out he was disposing of the note in fraud of his trust, the bank must suffer the consequences of the risk it assumed.

In the case of *Shaw v. Spencer*, 100 Mass. 382, the question is considered whether the addition of the word trustee to the name is alone sufficient to indicate a trust and put a party upon inquiry. That was the case of stock certificates which were pledged by the holder as collaterals for certain acceptances. The certificates in question were in the name of E. Carter, trustee. They were by him endorsed. One of the questions presented was whether the word trustee was sufficient to put the holders upon inquiry and thereby affect them with notice of the trust.

The court says on page 393, "The rules of law are presumed to be known by all men, and they must govern themselves accordingly. The law holds that the insertion of the word trustee after the name of a stockholder does indicate and give notice of a trust. No one is at liberty to disregard such notice and to abstain from inquiry, for the reason that a trust is frequently simulated or pretended when it really does not exist. The whole force of this offer of evidence is addressed to the question whether the word trustee alone has any significance and does amount to notice of the existence of a trust. But this has heretofore been decided, and is no longer an open question in this commonwealth." And upon the ground that the pledgees took the certificates with this notice of the trust, it was held that they could not retain them against the equitable owner, inasmuch as Carter, the trustee, had no authority to use or dispose of them for any such purpose.

The argument that the bank should not be deprived of its action against J. Regester & Sons, whose endorsement it is claimed guarantees the preceding endorser, would be entitled to weight but for the facts of the case. While the rule is undoubted that a subsequent endorser guarantees preceding endorsements, it cannot apply to a case where in fact there was no previous endorsement at the time of the alleged second endorsement. The obligation of J. Regester & Sons upon this note were those of original makers, *Ives v. Bosley*, 35 Md. 263; *Good v. Martin* (Supreme Court of the United States) 17 Am. Law Rep. N. S. 111; as is clearly shown by the proof in the case. Their name was placed upon the note as security, and they cannot be held to a contract of guaranty into which they never entered. That parol evidence is admissible to show the character in which they stand relative to this note is settled by the Supreme Court of the United States in the case of *Good v. Martin*, just referred to.

We are, therefore, very clearly of opinion that the bank cannot hold Regester & Sons liable as guarantors; when the note is paid their liability ceases.

We find no error in the decree of the court below, and it will be affirmed.

Court of Appeals of Kentucky.

JAMES L. HENDERSON v. CITY OF COVINGTON.

Municipal corporations are delegates of the sovereign for certain purposes of governmental character, and the powers delegated will always be strictly construed with reference to the intention of the grant.

The municipal authorities, therefore, have no power to appropriate the revenues of a city except to the discharge of some duty imposed by law, or to accomplish some object for which the corporation was created.

A city cannot appropriate money to pay the expenses of persons to visit the state capital and procure legislation enlarging its corporate powers, even though it be conceded that such additional powers would be for the general benefit of the city.

THE City Council of Covington, desiring to procure legislative authority to the city to build a bridge over the Ohio river, and also desiring some additional legislation by Congress in aid of the project, procured certain persons to visit Frankfort, and advocate before committees of the General Assembly the passage of the desired state legislation; and others to visit the Federal capital and procured the necessary congressional action.

Afterward the city council passed a resolution appropriating out of the revenues of the city the sum of \$186, to pay the expenses incurred by these gentlemen in going to Frankfort and Washington city.

The appellants, who are citizens and taxpayers of the city of Covington, brought this suit to enjoin the city officials from paying the money in accordance with the resolution of the council. The court below sustained a demurrer to the petition.

Stevenson & O'Hara and J. N. Furber, for appellants.

W. W. Cleary, for appellees.

The opinion of the court was delivered by

COFER, J.—The city council is authorized to levy and collect taxes—not, however, to exceed a designated amount on each \$100 worth of taxable property; but the charter does not, and indeed could not, consistently enumerate the purposes to which the rev-

enues of the cities shall or may be appropriated; and whether the appropriation in question here was authorized must be determined by an inquiry into the nature of municipal corporations, and the objects for which they are created.

They are agencies of the sovereign to whom certain powers are delegated, because they can be safely confided to and can be more intelligently and advantageously exercised by a local magistracy than by the sovereign authority in the state; but as the powers delegated are sovereign powers, the instrument by which they are delegated will always be strictly construed, so that only such as were clearly intended will be regarded as having been granted.

Such corporations "can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association:" *Spaulding v. Lowell*, 23 Pick. 71; and authorities cited in note 1, sect. 55, Dillon on Municipal Corporations.

The construction of a bridge across the Ohio river to connect the city of Covington with the neighboring city of Cincinnati, in the state of Ohio, was not, under the charter as it then existed, a part of the duty of the city council of Covington, nor was the legislation sought by the council necessary to enable it to perform its corporate duties, or to accomplish the purposes for which the corporation was created. True, such an enterprise might be of very great advantage to the city, by inviting population, enhancing the value of real estate, and in many other ways.

The same might be said of the establishment of a line of ferry boats to ply between Covington and Cincinnati, of a line of packets to ply between Covington and New Orleans, Louisville, or Pittsburgh, and of a railroad connecting with any of the large cities on the Atlantic sea-board; and if the city council might lawfully appropriate the revenues of the city to procure legislation to authorize it to build a bridge over the Ohio, because such a bridge would benefit the city, it might, upon the same ground, make appropriations to secure legislative authority to accomplish the other enterprises to which we have referred, and corporate expenditures might thus be increased indefinitely.

With the question whether their corporate powers should be enlarged, the corporate authorities, as such, had no concern. Their

duties and powers were ascertained and fixed by the legislature which created the corporation to exercise the powers granted, and perform the duties imposed; and the city council have no authority to appropriate any of the revenues of the city, except to enable it to discharge some duty imposed by law, or to accomplish some object for which the corporation was created: *Stetson v. Kemper*, 13 Mass. 271.

The members of the city council, in their capacity of citizens, had a right to apply to the legislature to enlarge the powers of the corporation; but it would be dangerous in the extreme to hold that they might employ the power already granted and the money belonging to the city to obtain through persons sent by them to appear before the General Assembly, an increase of the powers of the corporation. If the authorities of cities and towns may, at their discretion, use the corporate revenue to procure such legislation as they may deem to be in the interest of their municipalities, the worst consequences may be apprehended. Such a practice would inevitably lead to abuses; and the history of municipal corporations in this country during the last quarter of a century, gives ample warning of the danger of relaxing the well-established rule that municipal charters are to be strictly construed, and the powers of corporate authorities confined to such as are granted in express words, or are necessarily and fairly implied, or are essential to the objects of their creation.

The amount involved here, and the nature of the additional powers sought by the city council, are sufficient to repel any suspicion of improper motives on the part of its members, and we are glad of an opportunity to declare the law of this subject in a case which, while it will serve all the purposes of a safe precedent, leaves unsullied the official and personal character and integrity of the functionaries whose act, we feel compelled, by principle, authority, and an obvious public policy, to declare illegal.

We might cite many adjudications to sustain this conclusion, but deem it unnecessary. The principle we have applied has become elementary in this country and in England, and when corporations are being multiplied, and their powers enlarged at each succeeding session of the General Assembly, and when corporate debts are being created at a rate exceeding the growth of the country in wealth and population, every enlightened person, lay or professional, must see the absolute necessity for a firm adherence to the

established canons for the construction of the charters of municipal as well as of private corporations.

We are, therefore, of the opinion that the court erred in sustaining appellees' demurrer, and the judgment is reversed, and cause remanded with directions to overrule the demurrer, and for further proper proceedings.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF KANSAS.²

COURT OF APPEALS OF MARYLAND.³

SUPREME COURT OF MICHIGAN.⁴

SUPREME COURT OF OHIO.⁵

SUPREME COURT OF WISCONSIN.⁶

ATTACHMENT. See *Receiver*.

Money paid into court and deposited in bank to the credit of the cause is not liable to the process of attachment: *Mattingly v. Grimes*, 48 Md.

ATTORNEY. See *Libel*.

Admission of Attorneys to practice in the State Courts—Fourteenth Amendment.—The privilege of admission as an attorney in the courts of Maryland, is limited to *white male citizens* above the age of twenty-one years: *In re Charles Taylor*, 48 Md.

The privilege of admission to the office of an attorney is not a right or immunity belonging to the citizen, within the meaning of the fourteenth amendment of the constitution of the United States, but is governed and regulated by the legislature, who may prescribe the qualifications required and designate the class of persons who may be admitted: *Id.*

BILL OF EXCEPTIONS.

Trial by Judge without Jury.—A bill of exceptions cannot be used to bring up the whole testimony for review when a case has been tried by the court, any more than when there has been a trial by jury: *Butts v. Mogridge*, S. C. U. S., Oct. Term 1878.

BILLS AND NOTES.

Notice to Accommodation Endorser.—Notice of the non-payment of

¹ Prepared expressly for the American Law Register, from the original opinions filed during October Term 1878. The cases will probably be reported in 7 or 8 Otto.

² From Hon. W. C. Webb, Reporter; to appear in 21 Kansas Reports.

³ From J. Shaaf Stockett, Esq., Reporter; to appear in 48 Md. Reports.

⁴ From H. A. Chaney, Esq., Reporter; to appear in 40 Michigan Reports.

⁵ From E. L. DeWitt, Esq., Reporter; to appear in 34 Ohio State Reports.

⁶ From Hon. O. M. Conover, Reporter; to appear in 46 Wisconsin Reports.

a negotiable promissory note must be given to an accommodation endorser, as well as to any other endorser, or he will be discharged from all liability on such note. Therefore, where G. executed a note to A., and A. endorsed the same merely for the accommodation of G., and G. then received the original and only consideration for the note from B., who was the first and only holder of the note for value, and said note was not paid when it became due, and no notice of its dishonor was given to A.; *Held*, That A. was discharged from all liability on the note: *Braley v. Buchanan*, 21 Kans.

Renewal—National Bank—Usury.—Where a national bank makes to one of its directors a loan of money, which in amount and in the rate of interest is in contravention of the National Banking Act, the borrower is not estopped to defend against a recovery of interest: *Bank of Cadiz v. Stemmmons*, 34 Ohio St.

If a payee take from the maker a promissory note, and at the same time surrender the maker's note of an earlier date given for a loan of money, the facts, and not merely what the payee called or considered the transaction, will determine whether it was a renewal or payment of the original loan: *Id.*

In rendering judgment on a promissory note given to a national bank in renewal, into which note illegal interest on the original note was incorporated, the whole interest on both notes will be disallowed: *Id.*

Payments made generally on a promissory note to a national bank, which note embraces illegal interest, will be applied in satisfaction of the principal: *Id.*

BROKER.

Commissions from both sides.—The same agent was retained by different persons on commission to negotiate sales or exchanges of their property, and he brought about an exchange between two of them, neither knowing that he was acting for the other. *Held*, contrary to public policy to allow him a right of action against both to recover his commissions, even though he had acted in good faith: *Scribner v. Colzar*, 40 Mich.

CHATTEL MORTGAGE. See Insurance.

When void for uncertainty.—A mortgage upon a stated quantity of mixed logs in the drive is void for uncertainty as against third parties who have acquired rights, if it does not furnish the data for separating the mortgaged logs from the mass: *Richardson v. Alpena Lumber Co.*, 40 Mich.

CONFLICT OF LAWS. See Slander.

CONSTITUTIONAL LAW.

Obligation of Contracts—Divorce.—The provision of the constitution prohibiting states from passing laws impairing the obligation of contracts has never been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate upon the subject of divorces. Those acts enable some tribunal not to impair a marriage

contract, but to liberate one of the parties because it has been broken by the other : *Hunt v. Hunt*, S. C. U. S., Oct Term 1878

Ex Post Facto Law.—An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed, or which imposes additional punishment to that then prescribed : *Burgess v. Salmon et al.*, S. C. U. S., Oct. Term 1878.

The *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal : *Id.*

CONTRACT.

Substitution of Legal for Illegal form of Indebtedness.—Where the city of Little Rock received and expended money for legitimate purposes, and issued therefor notes in the form of bank bills, a form of indebtedness prohibited by the statutes of the state, but afterwards cancelled these bank notes and delivered in lieu thereof obligations in the form of bonds, to which there was no legal objection : *Held*, that this new form of obligation was valid and collectable : *City of Little Rock v. Merchants' National Bank*, S. C. U. S., Oct. Term 1878.

Where the consideration of a contract declared void by statute is morally good, a repeal of the statute will validate the contract : *Id.*

COPYRIGHT. See *Execution*.

COUNTY.

Expenditure of County Funds for purposes outside of authority of the Commissioners—Injunction.—Where a board of county commissioners have executed on behalf of a county a contract for the erection of permanent county buildings, which is void for want of power on the part of the commissioners, as officers of the county, to make, and are carrying out the terms of the contract at the cost of the county, and using the general revenue fund to pay for the work done thereunder. *Held*, that they may be restrained by injunction from erecting said building, and from drawing any warrants on the county treasurer therefor : *State ex rel. Reed v. Board of County Commissioners of Marion County*, 21 Kansas.

CRIMINAL LAW.

Defective Indictment—Offence created by Statute—Effect of a Trial under a defective Indictment.—An indictment, under sect. 163 of art. 30 of the code, charging a party with receiving, well knowing them to be stolen, "four pieces of printed paper commonly called United States 5-20 bonds of the issue of the year 1865, each of the value of \$1000 current money," is fatally defective in that it does not charge in distinct and positive terms that the "four pieces of printed paper" were bonds or certificates of indebtedness issued or "granted by or under the authority of the United States : " *Kearney v. The State*, 48 Md.

The want of a direct allegation in an indictment of anything material in the description of the substance, nature or manner of the crime cannot be supplied by intendment. It is an essential requisite in every indictment that it should allege all matters material to constitute the particular crime charged, with such positiveness and distinctness, as not to need the aid of intendment or implication : *Id.*

In an indictment for an offence created by statute, it is sufficient to describe the offence in the words of the statute, and where the words of the statute are descriptive of the offence, the indictment should follow (in substance at least) the language of the statute, and expressly charge the described offence on the defendant, or it will be defective. It is necessary that the defendant should be brought within all the material words of the statute, and nothing can be taken by intendment : *Id.*

A party not having been tried on a valid indictment has not been put in jeopardy, and may on being discharged be re-arrested, re-indicted and tried again : *Id.*

Evidence—Impeaching Character of Witness.—Where a convict, who has been in the penitentiary two years, is taken therefrom to testify as a witness, and does so testify, it is competent for the adverse party to prove that his reputation for truth and veracity was bad, at the time of and previous to his conviction, at the place where he then resided : *Hamilton v. The State*, 34 Ohio St.

On the trial of a criminal case, it is error to permit the state to prove by cross-examination of a witness called by the defendant, that the accused stands indicted for other offences : *Id.*

Married Woman—Coercion.—The presumption that a married woman who commits a criminal act in the presence of her husband acts under his coercion, is only *prima facie* ; and when it is shown that she acted voluntarily, and not by coercion, she is liable to a prosecution : *Tabler v. The State*, 34 Ohio St.

DAMAGES. See *Libel*.

DEBTOR AND CREDITOR. See *Execution*.

DIVORCE. See *Constitutional Law*.

EASEMENT.

Appropriation by City for use of Street.—A municipal corporation is authorized to appropriate an easement in land abutting on a street, for the purpose of making a sloping fill in order to afford lateral support to the street : *Dodson v. The City of Cincinnati*, 34 Ohio St.

Such appropriation does not divest the owner of his dominion over the property subject to the easement. He may still use it for all purposes not inconsistent with the special purpose of furnishing the necessary support to the street : *Id.*

Where such an easement has been appropriated, the landowner is entitled to be compensated for all the rights of which he has been deprived ; but where he still retains substantial rights in the property, he is not entitled to be allowed the value of the land in fee simple : *Id.*

EQUITY.

Enjoining Proceedings in Equity.—One suit in equity will not lie to enjoin the execution of process issued in another such suit, whether the second suit be brought in the same or another court, by a party or by a stranger to the first : *Endter v. Lennon*, 46 Wis.

ERRORS AND APPEALS. See *Mandamus*.

When Judgment not reversed.—Where a cause has been tried upon the merits, and submitted to the jury upon evidence, received without objection, tending to show a cause of action in plaintiff's favor, and under instructions to which no exception was taken, a judgment for the plaintiff on a general verdict in his favor will not be reversed on the ground that the complaint omits some averment essential to the cause of action : *Vassau v. Thompson*, 46 Wis.

RYAN, C. J., and LYON, J., dissent from the judgment, holding that the complaint, which was insufficient, might have been amended from the evidence, and under the charge, in *either of two different ways* so as to state two different causes of action ; and that in such a case judgment for plaintiff on a general verdict should not be upheld : *Id.*

EVIDENCE. See *Insanity* ; *Libel* ; *Telegraph*.

Offer of Compromise.—Where there has been an offer by a party, either verbal or in writing, expressly stated to be made without prejudice, or where from the nature of the offer and the circumstances under which it was made, it may be reasonably inferred that the offer was but the expression of a willingness to pay money, allow credit, deliver property, or do some other thing, by way of compromise, to buy peace and prevent litigation, such offer is not evidence as an admission against the party making it ; but if the admission of the existence of a *fact* be made, unless expressly without prejudice, or as a mere concession in order to induce a compromise, there is no rule of law which would exclude such admission as against the party making it : *Calvert v. Friebeus*, 48 Md.

Tax-Sale Deed.—Statutes which make a tax-sale deed *prima facie* evidence of the *regularity* of the sale, do not relieve a purchaser from the burden of showing that the proceedings anterior and necessary to the power to make the sale actually took place. But the Act of Congress of 1863 declares that the commissioners' certificate shall be *prima facie* evidence not merely of the regularity of the sale but also of its *validity* and of the *title* of the purchaser, and it enacts that it shall only be affected as evidence of the regularity and *validity* of the sale by establishing the fact that the property was not subject to taxes, or that the taxes had been paid previous to the sale, or that the property had been redeemed : *De Treville v. Smalls*, S. C. U. S., Oct. Term 1878.

This Act of Congress contemplates a certificate of sale in cases where the United States becomes the purchaser as fully as where the purchase is made by another. *Id.*

Where Deposition destroyed by Fire, admissibility of Evidence as to Substance.—Where depositions were destroyed by the Chicago fire between the first and second trial of an action, and the witnesses who made the depositions at the first trial had since died, *held*, that testimony of other witnesses as to the substance of these depositions was admissible at the second or new trial : *Ruch v. City of Rock Island*, S. C. U. S., Oct. Term 1878.

The living witness may use his notes taken contemporaneously of the testimony to be proved in order to refresh his recollection, and thus aided he may testify to what he remembers, or if he can testify positively to the accuracy of his notes, they may be put in evidence : *Id.*

EXECUTION.

Unpublished Manuscripts not Leviable Property.—Unpublished manuscripts are not leviable property. So held of a set of abstract books: *Dart v. Woodhouse*, 40 Mich.

The right of an owner of manuscript to publish it or not is an incorporeal property right belonging to him personally, independent of locality and not to be interfered with: *Id.*

The copyright of a published work cannot be reached by the owner's creditors unless by statutory authority. *Id.*

Creditors cannot complain of the disposal of property that they cannot reach: *Id.*

EXTRADITION.

Between the States—U. S. Statutes—Statutes of the States.—The certificate of authentication provided for in sect. 5278 of the United States Revised Statutes (1027) is not required to be in any particular form, and where the language employed by the demanding governor in the requisition shows the copy of an indictment annexed thereto to be authentic, it is sufficient: *Ex parte Sheldon*, 34 Ohio St.

It is no ground for discharging a fugitive from justice on habeas corpus that the indictment, after charging embezzlement, by way of conclusion in the same count, also avers that "so" the defendant committed larceny: *Id.*

Where from the authenticated copy of the indictment annexed to the requisition it appears that the fugitive stands charged in the demanding state with embezzlement, the printed statutes of such state, purporting to be published by its authority, may be received to show that embezzlement is made a crime by the laws of that state: *Id.*

After an alleged fugitive from justice has been arrested on an extradition warrant, he will not be discharged on the ground that there was no evidence before the executive issuing the warrant, showing that the fugitive had fled from the demanding state to avoid prosecution: *Id.*

FALSE IMPRISONMENT. See *Insanity*.

FORMER ADJUDICATION.

Who bound by—Assignee of Mortgage pendente lite.—A party who is made defendant to a foreclosure suit under the allegation "that he has or claims some interest in or lien upon the said mortgaged premises, which interest or lien accrued subsequently to and is inferior to that of the said plaintiff," and against whom the judgment is taken by default "that he and all persons claiming under him since the commencement of the action, are for ever barred and foreclosed of all right and equity of redemption in the said mortgaged premises, and in each and every part thereof," is barred by such decree from maintaining a suit to foreclose a mortgage alleged by said defendant to be a prior one on the same premises; and held, that the assignee of the said defendant mortgagee of the mortgage which is non-negotiable, and to which he obtained title *pendente lite*, is also barred and foreclosed by the same judgment: *Case v. Bartholow*, 21 Kans.

As to whom Judgment is a bar.—A judgment is no bar to a subse-

quent action not between the same parties or their representatives or privies: *Tierney v. Abbott*, 46 Wis.

Plaintiff obtained a judgment for rent against C. and B. & Co. jointly, but there was no such firm as B. & Co., that being a misnomer for A. & Co.; and satisfaction of the judgment out of the property of A. & Co. was thus defeated, and it remained unsatisfied. Afterwards this action was brought for the same rent against A. & Co., the complaint alleging that they rented the property through C. as *their agent*. *Held*, that plaintiff is not estopped by the former action and judgment from maintaining this action against A. & Co. as sole principals: *Id*.

GARNISHEE. See *Receiver*.

GIFT. See *Husband and Wife*.

HIGHWAY.

Taking Land for—Assessment of Damages.—A jury, in assessing the damages sustained by a landowner by reason of the establishment of a public road across his land, cannot take into consideration for the purpose of reducing his damages, *all conveniences and benefits* accruing to him by reason of the location of the road, but only such conveniences and benefits as are direct and special as to him and his land, and such as are the direct, certain and proximate result of the establishment of the road. They cannot take into consideration such conveniences and benefits as are received in common by the whole community: *Roberts v. Board of Commissioners of Brown county*, 21 Kans.

Increased value of the land may often be taken into consideration in fixing the amount of the damages sustained by the owner thereof in laying out and establishing roads. But this can be done only where such increased value arises from some direct, special and proximate cause, such as the draining of the land, or building bridges across streams running through the land, or making some other valuable improvement on or near the land, by means of which the owner will be enabled to enjoy his land with greater advantage. Increased value, founded merely upon increased facilities for travel and transportation by the public in general, is not the kind of increased value which may be taken into consideration for the purpose of reducing the damages to be awarded to the land owner: *Id*.

HUSBAND AND WIFE. See *Criminal Law*; *Insurance*.

Gift from Husband to Wife—Change of Possession.—In determining whether a gift has been made, the question of change of possession must be considered in connection with the other facts in the case; as where it passes between married persons living together. Open and visible change of possession can hardly be required to establish the fact of a gift from a husband to his wife when they are living together: *Davis v. Zimmerman*, 40 Mich.

A wife claimed ownership of a horse as given to her by her husband, and testified that after the gift was made she went to the stable where the horse was kept and gave directions respecting its keeping, and that she afterwards controlled it. *Held*, admissible as *res gestæ* and as tending to show that possession was delivered: *Id*.

Where a woman claims property as a gift from her husband, the only

question is whether she establishes her right by a fair preponderance of evidence. But it is proper to consider the circumstances of the relation and the facility with which fraud may be perpetrated under its protection: *Id.*

INJUNCTION. See *Equity*.

INNKEEPER.

Liability of—Statutory Requirements.—Where a safe for the keeping of articles is provided by a hotel-keeper, and the notices given as required by statute, a loser failing to take the benefit of the protection given him must bear his own loss. *Elcox et al. v. Hill*, S. C. U. S., Oct. Term 1878.

Where the loss is occasioned by the personal negligence of the guest himself, the liability of the innkeeper does not exist: *Id.*

INSANITY.

False Imprisonment in an Insane Asylum.—In an action for false imprisonment brought by a patient in an insane asylum against the superintendent, the broadest latitude should be allowed in showing the jury what the patient said and did and how she appeared when there, as facts bearing on the question of her sanity: *Van Dusen v. Newcomer*, 40 Mich.

An expert cannot be asked for a conclusion upon facts not stated; as where a physician is asked his opinion as to what produced the condition of a patient as he observed it: *Id.*

One cannot lawfully be placed or detained in an insane asylum against his will, unless actually insane: *Id.*

The confinement of a person dangerously insane is always justifiable. *Id.*

Officers having quasi judicial powers are not liable for injuries resulting from acts done understandingly and in good faith within the limits of an authority expressly granted to them: *Id.*

Whether the superintendent of an asylum is liable for detaining a sane person whom in good faith he believes to be insane, *query*: *COOLEY, J., and CAMPBELL, C. J.,* holding that he is; *MARSTON and GRAVES, JJ.,* that he is not: *Id.*

INSURANCE.

Forfeiture—Insurable Interest—Mortgage of Chattels.—When a forfeiture of an insurance policy is alleged on merely technical grounds, not going to the risk, the contract of insurance will be upheld, if it can be without violating any principle of law: *Appleton Iron Co. v. British American Assurance Co.*, 46 Wis.

Both mortgagor and mortgagee of chattels have insurable interests therein; and a provision in a policy of insurance issued to the mortgagor, by which any loss is payable to the mortgagee as his interest may appear, is valid: *Id.*

Where the interest of mortgagees in insured chattels exceeded the insurance, and, by the terms of the policy (taken by the mortgagor), the amount of any loss would become payable to the mortgagees, the legal title to the policy, as well as to the chattels, was in the mortgagees, and the mortgagor could not (by a general assignment in bankruptcy or otherwise) transfer the title to either, so as to give effect to a clause in

the policy which provided that if any change should take place in the title to the chattels, by legal process, judicial decree or voluntary transfer or conveyance, or if the policy should be assigned before a loss without the insurer's consent endorsed thereon, it should be void: *Id.*

Whether such a provision for forfeiture of insurance as that above stated is not void as against public policy, *quære*.

Upon such forfeiture being incurred, the policy is voidable only, at the election of the insurer; and the forfeiture may be waived by laches of the insurer misleading persons interested in the policy to their prejudice. And in this case, if, by any act of the mortgagor, a forfeiture had been incurred on which the insurer meant to rely, good faith would have required it to notify the mortgagees, to give them an opportunity to protect themselves by other insurance: *Id.*

Forfeiture of Policy for Misrepresentation of Title.—A policy contained a clause of forfeiture for the omission to state any material fact, and made the application of the insured a warranty. *Held*, that it was avoided by the statement of the insured that his title to the property was absolute, when in fact it was held by him and his wife under the same deed: *Ætna Ins. Co. v. Resh*, 40 Mich.

The existence of any substantial encumbrance upon property is a material fact in insurance, whether the statements of the insured are made warranties or not: *Id.*

Where property is granted to a husband and wife by the same deed, the husband is neither a tenant in common nor an ordinary joint tenant; he has no right to an undivided half of the property, and if he dies his estate goes to his wife by survivorship: *Id.*

LAND DAMAGES. See *Easement*; *Highway*.

LANDLORD AND TENANT.

Lease, construction of—Rights of the United States as Lessee.—Leases, like deeds or other written instruments, must receive a reasonable construction, as derived from the language employed, without the aid of extrinsic evidence beyond what may be necessary to identify the premises and to disclose the circumstances surrounding the transaction when the instrument was executed. *Bradley v. The United States*, S. C. U. S., Oct. Term 1878.

Where the United States has leased property, public officers, having no funds in the treasury and being without authority to bind the United States, can only agree to pay the stipulated rental, provided the money is appropriated by Congress, and if the lessor, voluntarily and without any misrepresentation or deception, enters into a lease on those terms, he must rely upon the justice of Congress: *Id.*

Where the lessor in such a case has been seasonably notified that he would not be paid for the third year any greater rent than the sum appropriated for the purpose: *Held*, that he could only recover such appropriated sums: *Id.*

LIBEL.

Notice of Justification—Variance.—Where the defendant in a libel suit gives notice of a general justification without serving particulars,

he must prove the truth of the libellous statements precisely as charged in the declaration. *Bailey v. Kalamazoo Publishing Co.*, 40 Mich.

Courts take judicial notice of the meaning of current phrases which every body else understands: *Id.*

A "pettifogging shyster" is an unscrupulous practitioner who disgraces his profession by doing mean work, and resorts to sharp practice to do it. General reputation is sufficient to justify the charge that a lawyer is a pettifogging shyster: *Id.*

Evidence to justify statements published after the commencement of a suit for libel is not admissible: *Id.*

It is not error to allow the defendant in a libel suit to show on what ground he based his information: *Id.*

Damages for a libel upon a candidate for public office are reduced to a minimum if the libel results from an honest mistake made in an honest effort to enlighten the public as to his character: *Id.*

Where a libellous charge is made against a candidate, and there is only a technical variance between the charge and its justification, proof that the party making it honestly believed it, should be received to show that there was no wrong intent: *Id.*

MANDAMUS.

Cannot be used to perform the office of an appeal or writ of error. *Ex parte Schwab*, S. C. U. S., Oct. Term 1875.

Where an application is made for the allowance of an injunction, it becomes the duty of the court to determine whether the case is one in which that power can be exercised. The question arises in the regular progress of the cause, and if decided wrong, an error is committed which, like other errors, may be corrected on appeal after final decree below, and cannot be corrected by mandamus: *Id.*

MORTGAGE. See *Chattel Mortgage*.

MUNICIPAL CORPORATIONS. See *Contract*; *Easement*.

NATIONAL BANK. See *Bills and Notes*.

NEGLIGENCE.

Burden of Proof—Risk incident to Employment.—One who brings an action as for an injury caused by defendant's negligence, has the burden of proving such negligence: *Steffen v. C. & N. W. Railway Co.*, 46 Wis.

In such an action, where, upon plaintiff's evidence, the accident appeared unaccountable, and defendant's evidence, so far as it accounted therefor, showed that it arose from an *occult risk incident to the employment*, or that, if there was negligence, it was that of the plaintiff, it was error to submit the question of defendant's negligence to the jury: *Id.*

NEW TRIAL.

Second application after refusal of first—Only a Party can ask for.—After a new trial has been absolutely denied, a second motion for the same relief, founded upon substantially the same grounds, cannot properly be granted: *Rogers v. Hoenig*, 46 Wis.

As a general rule, no one but a party to the suit can be heard to ask for a new trial: *Id.*

Plaintiff, as owner, recovered possession of goods from defendant, who had taken them as agent for one M.; and after defendant had paid the judgment for damages and costs, and had failed to obtain, on demand, reimbursement from M. of the amount so paid, and for time and money spent in the litigation, M., who was insolvent and had not indemnified defendant against the expense of further litigation, nor ever applied to be made a defendant, obtained an order for a new trial in defendant's name, but against his will: *Held*, that the order was improperly granted: *Id*.

OFFICER.

Right to Salary.—A legally elected officer, duly qualified and standing ready to perform the duties of his office, is entitled to the salary if it has not been paid, even though debarred from the performance of his duties by an intruder acting in good faith: *Comstock v. City of Grand Rapids*, 40 Mich.

PARTNERSHIP.

Note given by one Partner after Dissolution.—As between a co-partnership and a creditor thereof, a note given in the firm name, without authority, by one partner, after dissolution, for a debt of the firm, the parties to the note intending to bind, and believing the note was binding on the firm, will not extinguish the firm debt: *Gardner v. Conn*, 34 Ohio St.

As between the partners themselves, such transaction will not discharge the non-consenting partner from liability to make contribution to the partner paying the debt: *Id*.

PAYMENT.

What amounts to.—A debtor delivered a horse to his creditor to sell it and apply the proceeds in payment of the debt. The creditor exchanged the horse for other property, and the amount to be applied was disputed. *Held*, that notwithstanding the dispute the transaction amounted to a payment, instead of a mere basis of set-off against plaintiff's claim: *Strong v. Kennedy*, 40 Mich.

RECEIVER.

Cannot be Garnisheed without leave.—The receiver's custody is that of the court which appointed him, and he cannot be sued or garnisheed without leave of the court: *People ex rel. Tremper v. Brooks*, 40 Mich.

ROAD. See *Highway*.

SLANDER.

Gravamen only need be Proved—Lex loci.—In actions for slander, it is sufficient if the gravamen of the charge, as laid, be proven: *Dufresne v. Weise*, 46 Wis.

Where, therefore, the slanderous words charged imputed to the female plaintiff a crime, and defendant's answer, while denying that he spoke the precise words charged, admitted that he spoke "other words of similar import," and justified by alleging that plaintiff did in fact commit the crime thus imputed to her, and the proof was that defendant

used words of similar import to those charged, though not quite the exact words, the variance was immaterial: *Id.*

Words falsely charging an act criminal by the law of the place of the act are slanderous *per se*, whether or not such act would have been criminal by the law of the place of the speaking. *Id.*

TAXATION.

Exemption from.—The right of taxation is never to be presumed to be surrendered by the sovereign power, and such surrender is never made unless it be the result of express terms or necessary inference. *County Commissioners v. Sisters of Charity*, 48 Md.

Exemption being a surrender of the power of taxation in favor of particular persons or property, is subject to the same principle, and, therefore, never to be presumed: *Id.*

Exemption is a special privilege, in conflict with a universal obligation, conferred only by positive law, and not founded in the character of the person or property, except in a few specified cases; and no general principle can be found in the constitution or laws of the state, which releases charitable or benevolent corporations from the universal obligation to contribute to the support of the government, in proportion to their actual worth in real or personal property: *Id.*

TELEGRAPH.

Production of Message in Court.—The statute (sect. 93, ch. 137, R. S. 1858) empowers the court in an action pending before it, to order either party to give the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers or documents in his possession or under his control, containing evidence relating to the merits of the action or defence. In an action for damages for a mistake in transmitting a telegraph from Ogden, Utah T., *via* Omaha to Milwaukee, where it was delivered by defendant to the N. W. Telegraph Co. to be transmitted to Madison, the complaint alleged, upon information and belief, that the mistake charged was made by defendant's agents at Chicago who reduced it to writing there; and, upon plaintiff's application with due notice, the court ordered defendant, within a specified time, to *deposit with the clerk of the court* the original message mentioned in the complaint, in the condition in which it was received by it for transmission; the original of the same as received and written down in its office at Chicago; and the original as received and written down in its office at Milwaukee, and delivered to the N. W. Telegraph Co. for transmission to Madison—each verified by the oath of some competent agent of the company; and in case of its inability to produce any one or more of such originals, to produce verified letter-press copies thereof; and that the papers should *remain in the custody of said clerk two days* for plaintiff's use and inspection and to enable him to take copies: *Held*, that the order was within the discretion of the court. *Phelps v. Atlantic and Pacific Telegraph Co.*, 46 Wis.

TENDER.

Objections to—Keeping it good.—Objection to the mode of tender must be made at the time of the tender. *Browning v. Crouse*, 40 Mich.

A tender does not remain in force if the payment is refused and received back : *Id.*

A debtor compromised with his creditors, but as he paid the amount of the compromise irregularly, the creditors refused the last tender and sued for the whole debt. Defendant, having paid part and tendered the rest of the amount agreed on, recovered judgment. The tender, however had not been kept good. *Held*, that the recovery was wrong, and that plaintiffs should have recovered the amount owing under the compromise agreement, with costs : *Id.*

TRUSTEE.

Justice of Peace Depositing Funds in his Bank Account.—A justice of the peace received money, in his official capacity, in satisfaction of a judgment on his docket, and deposited the same in bank to his private account. The bank failed before the sum deposited was drawn therefrom. *Held*, That the justice was liable to the judgment-creditor for the amount so received and deposited : *Shaw v. Bauman*, 34 Ohio St.

UNITED STATES. See *Landlord and Tenant*.

UNITED STATES COURTS.

Supreme Court—Jurisdiction—Amount in Dispute.—While in the absence of anything to the contrary the prayer for judgment by the plaintiff, in his declaration or complaint, upon a demand for money only, or by the defendant in his counter claim or set-off, will be taken as indicating the amount in dispute, yet if the actual amount in dispute does otherwise appear in the record, reference may be had to that for the purpose of determining the jurisdiction of this court : *Gray v. Blanchard*, S. C. U. S., Oct. Term 1878.

Federal Question.—Where the case has been decided by the court below upon principles of general law alone, and it nowhere appears in the record that the plaintiff in error claims any title, right, privilege or immunity, under the constitution or authority of the United States, this court has no jurisdiction : *Bank of Old Dominion v. McVeigh*, S. C. U. S., Oct. Term 1878.

Jurisdiction of the Supreme Court—Federal Question.—It is not enough to give this court jurisdiction over the judgment of the state courts for a record to show that a federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it actually was decided, or that the judgment as rendered could not have been given without deciding it : *The State ex rel. Citizens' Bank v. Board of Liquidation of Louisiana*, S. C. U. S., Oct. Term 1878.

Federal Question.—Where the court below decided that as between vendor and vendee there could be a sale and delivery of cotton, so as to pass title to the vendee before the payment of the government tax assessed upon cotton, under the act of July 1st 1862. *Held*, that no federal question was involved and that the Supreme Court had no jurisdiction to review the case on error : *Carson v. Ober et al.*, S. C. U. S., Oct. Term 1878.

USURY. See *Bills and Notes*.

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THE ASSUMPTION OF ENCUMBRANCES BY THE PURCHASER OF LAND.

(Concluded from June No.)

IN Pennsylvania it appears most clearly both that the purchaser of encumbered premises incurs no personal responsibility without special agreement, express or implied, and that the responsibility, when incurred, is only to indemnify his grantor. In the early case of *Kearney v. Tanner*, 17 S. & R. 94, a grantor who had been compelled to pay the deficiency on the mortgage-debt after a sale of the premises, brought assumpsit for the same against his grantee, who had bought with a knowledge of the encumbrances. MCKEAN, J., in the lower court, charged the jury that, "The defendant was liable to pay the ground-rent and encumbrances on the property if he knew of them when he purchased. That he knew of the encumbrances may be inferred from his payment of the interest. If the fact be that he agreed to take the house subject to these encumbrances, then he undertook to pay them and indemnify the plaintiff, and is liable in this action. * * * Although the defendant purchased the property, yet the plaintiff continued liable, and Kearney became bound to indemnify him. The fact whether he purchased subject to these encumbrances you will determine; and if you determine in the affirmative, then it results that if the plaintiff is bound to pay, the defendant is liable."

On error to the Supreme Court, ROGERS, J., said: "It has been erroneously supposed that it was adjudged by the late Judge MCKEAN, that a purchaser of mortgaged premises, made himself

personally liable to the mortgagee for the amount due on the mortgage. If such had been the decision, it was well calculated to create alarm, as the assertion by high authority of a principle heretofore not so understood by the profession and most extensive in its operation. I was pleased to find on a careful examination that this does not appear to have been his opinion. The charge of the court admits of this construction, and when fairly considered no other meaning can be collected from it; that when there was an agreement that the vendee should pay the mortgage-money and afterwards the vendor had been compelled to pay the amount due on the mortgage, he could sustain an action for money paid, laid out and expended, against the purchaser. That an action will lie, when there is a special agreement, either express or implied from the circumstances, is not denied; for it forms part of the purchase-money or price of the land which it is just and in compliance with his agreement that the vendee should pay." But the case which gave direction to all the subsequent decisions was *Campbell v. Shrum*, 3 Watts 60. Shrum entered into articles of agreement with Astley and Gibson, for the purchase of land, which he agreed to convey to Campbell, "subject to the payment of all the purchase-money and interest now due on an article of agreement between Thomas Astley and James Gibson of the one part and the said Shrum of the other part." The purchase-money not having been paid, Shrum brought an action in covenant to the use of Astley, who had become clothed with Gibson's interest against Campbell upon the agreement. SERGEANT, J., said: "Here the principal consideration for Shrum's agreement to transfer to Campbell was that Campbell should discharge the arrears due by Shrum for the land, and relieve and exonerate him from his liability therefor. No one that reads this clause can doubt that the understanding of the parties was that Campbell agreed to do so. Without this construction, Shrum would have been left to pay Astley and Gibson in the first instance, and afterwards be turned round to recover upon the equitable claim for indemnity which he would have against Campbell. Whereas, it was intended under the agreement, that Campbell should pay off these arrears forthwith; and a breach of the undertaking upon his part occurred when he omitted to do so, for which Shrum could at once bring his action." Whether the construction adopted was the only or the best one, it is too late to inquire, but we may observe that Campbell's responsibility was held to be merely

that of indemnifying Shrum, and that the action was brought not in the name of Astley against Campbell, but in the name of Shrum to the use of Astley. And no other form could have been sustained in the face of the earlier decision of *Beach v. Morris*, 12 S. & R. 16. Beach entered into articles of agreement for the sale of land, purchase-money to be paid in instalments, with Wilson, who assigned the articles subject to the payment of the whole purchase-money to the defendant Morris. No purchase-money having been paid, Beach brought an action of debt therefor against Morris. TILGHMAN, C. J., "I do not see how the action can be supported, because between the plaintiff and the defendant there is no privity, either of contract or estate. That there is no privity of contract is evident, because privity of contract is *personal* privity and is confined to the *persons* of the contracting parties, and there can be no privity of estate, because the estate has never passed from the plaintiff. The assignment of Wilson passed to the defendant all the right which Wilson had, that is to say, an equity by virtue of which he was entitled to demand a conveyance on payment of the purchase-money. Wilson, notwithstanding his assignment, remained liable for the purchase-money on his covenant in the articles of agreement between him and the plaintiff, and from this liability he could not withdraw himself by substituting the defendant in his place. * * *

In no point of view is the plaintiff entitled to this action against the defendant, who never made any kind of contract with him. The plaintiff made his bargain with Wilson and kept the legal estate in himself by way of security; and the defendant contracted not with the plaintiff, but with Wilson, and is liable to Wilson on that contract, whatever it may have been." That contract was one of indemnity, as is shown by *Campbell v. Shrum*, which GIBSON, C. J., in *Blank v. German*, 5 W. & S. 40, explained as follows: "Had the plaintiffs below *purchased* the property subject to the mortgage-debt, the case would have been within the principle of *Campbell v. Shrum*, because the price would have been estimated at the clear value less the mortgage-debt, and it may be said, that so much of the price would have been virtually retained to answer it; so that the plaintiff would have lost that much, had he been compelled to pay with other funds than those set apart for the purpose in the defendant's hands. As it would have been a fraud in them to retain his money and let him be pursued for it on his bond, they would have been held liable for it on an implied promise to

apply it to the purpose intended. And it may be said in every such case, that he who purchases expressly subject to an encumbrance, as between the vendor and himself makes the debt his own, which is the principle of *Campbell v. Shrum*." The expression occasionally used in this opinion (and it is true of others), "subject to an encumbrance," must be understood to mean, subject to the payment of an encumbrance, which was the clause in the deed, as the reporter's statement shows. The facts of *Woodward's Appeal*, 2 Wright 326, were as follows: A guardian had purchased for her ward premises "under and subject, nevertheless, to the payment of a certain mortgage-debt or sum of \$2000," and the court held that by so doing, she had incurred a personal responsibility, against which she should be indemnified by her ward's estate. Judge STRONG said, in the course of his reasoning, without adopting either view, that there were two explanations of the liability of a grantee in such case. "Thus, in *Blank v. German*, 5 W. & S. 42, it was stated to be a general principle that he who purchases expressly subject to an encumbrance, as between the vendee and himself, makes the debt his own. * * * There is a class of cases which treat a purchase expressly subject to a charge or encumbrance as constituting an engagement by the vendee to indemnify the vendor against loss or expense in consequence of the charge or encumbrance. * * * But it is of no importance now to inquire whether Mrs. Woodward, by taking a deed from Mr. Spackman for the Arch street house, 'subject to the mortgage thereon,' assumed the debt as between the grantor and herself, or whether she only engaged to indemnify him against being called upon to pay it." The distinction as pointed out is without a difference. The last two propositions are precisely the same. For the grantee to assume a debt between himself and his grantor is to assume the debt for his grantor only, and for no other person in the world; i. e. to indemnify him, and this appears from the words themselves as well as from the cases where they are used synonymously. That Judge STRONG thought so himself may be seen from his language in *Burke v. Gummey*, 13 Wright 518: 'We have no cases that are not reconcilable with the doctrine that one who purchases expressly subject to an encumbrance makes the debt his own, and assumes to protect the vendor.' "

Taylor v. Preston, 29 P. F. Smith 436, is a literal repetition of *Campbell v. Shrum*. In *Girard Insurance Co. v. Stewart*, 5 W.

N. C. 87, a mortgagee brought assumpsit for a deficiency directly against a grantee of the premises, under and subject to the payment of the mortgage, who pleaded that he took title as a mere dry trustee, of which his grantor had full knowledge. The court held the mortgagee could not recover, because the defendant personally had not made any agreement about the mortgage at all.

But the law upon this point has been thrown into great uncertainty by the later decisions arising out of the administration of decedent's estates in contests between the heirs or devisees and the personal representatives as to the fund out of which encumbrances should be paid. In *Kezey v. Kezey*, 9 S. & R. 71, Kezey, Sr., devised a tract of land which he had bought from one Lowrie, subject to purchase-money due the Commonwealth, to his executor, Kezey, Jr. The executor claimed credit in his account for payment of the purchase-money, which was disallowed on the ground that the decedent had never made it his personal debt. TILGHMAN, C. J., said, *inter alia*, "It may be considered, however, as very clear that even supposing the original taker-up of the land (Lowrie) to have been liable to an action for the purchase-money, that liability would not extend to his assignee." In *McCracken's Estate*, 5 Casey 427, Socin had covenanted to convey land to Springer, purchase-money to be paid in annual instalments; Springer, after paying several instalments, assigned his interest in the land to McCracken, subject to the payment of the unpaid instalments. McCracken, after paying several instalments, died, having devised the land to his daughters, who contended that they should be exonerated by the payment of the instalments in arrear out of the decedent's personal estate. The case appears to have been little considered by the counsel or by the court. LOWRIE, J., said, "Then comes the question, was the debt due to H. Socin a debt of the estate? We think it was; for though McCracken did not bind himself by covenant to pay the balance of the purchase-money due to Socin, yet by buying the equitable title and getting the assignment of the articles from Springer, he impliedly undertook to pay the balance and keep Springer clear of it. His debt or duty was directly to Springer, and through him to Socin." The language of the court shows that there was no intention to abandon the uniform doctrine of the previous cases that the liability of the grantee was simply to indemnify his grantor. But under *Kezey v. Kezey*, *supra*, and the English cases this did not make the encumbrance his personal debt, so that it

should be thrown for payment upon his personalty. The second ground for the decision is the only one on which it can satisfactorily rest, viz: that it was the manifest intention of the testator that his daughters should take the land in fee discharged of the encumbrances. The intention of the testator is the law of the will, and it being clear there was no occasion to resort to arbitrary legal principles designed to regulate administration in the absence of intention. In *Hoff's Appeal*, 12 Harris 200, the decedent devised to his wife premises which he had purchased for \$13,900, no reference being made in the deed to any mortgage, but the receipt endorsed on it was for \$5500, "which with a certain mortgage debt of \$8400 made of the same premises by the above-named Abner Elmes to Isaac Harvey, Jr., and the interest due and to grow due thereon, are to be paid by the said John Hoff, is in full of the consideration for the above granted premises." The court held that the mortgage should be paid out of the personalty. WOODWARD, J., said, "Now it is immaterial whether this amounted to a covenant on the part of Hoff to pay the mortgage, though according to the doctrine of *Campbell v. Shrum*, 3 Watts 60, and the cases there cited, it might be easy to say it did; but surely there can be no doubt he would be liable to an action for money had and received at the suit of a mortgagee. * * * If then, Hoff in his purchase of Reynolds, made himself liable to the mortgagee in any form of action, how can we hesitate to call the mortgage his debt? It is of no consequence that the mortgagee was not a party to the dealings between Hoff and Reynolds, for it is a rudimental principle that a party may sue on a promise made on sufficient consideration for his use and benefit, though it be made to another and not to himself. It is equally unimportant that the mortgagee's remedies against the land remain unimpaired. The question before us does not touch the specific lien of the mortgage, but the personal liability of the purchaser. He made himself liable to his vendor and to the mortgagee, and he retained purchase-money enough in his hands to indemnify himself. That money belonged to the mortgagee, and I hold he might have recovered it in assumpsit, if not in covenant." This is the first time in Pennsylvania that a grantee who had assumed a mortgage was held to have made it his own personal debt, not only in the sense of the English cases so that his executors shall pay it, but also so as to be himself liable to the mortgagee at law. The decision appears to have been a clear

departure from the principle upon which all the previous cases had rested.

The New York authorities were not cited by the counsel or the court, and the judgment appears to have been founded in part upon *Belvedere v. Rochfort*, *supra*; a case that may be fairly considered overruled, and in part upon the argument of counsel therein, and the discussion of it contained in 2 Powell on Devises 676. The circumstances manifesting the intention of the testator to make the encumbrance his own personal debt, were far less cogent than those contained in that case, and it is to be regretted that a very doubtful decision was extended any further. But we may positively complain that the court should also adopt as law the contention of counsel that such a stipulation for the especial benefit of the vendor, and incidentally for the benefit of the mortgagee, made the vendee liable to the latter at law.

This has never been decided in England in any case, and in cases of administrators there, the question of the liability of a decedent's personalty to exonerate his realty from encumbrances, is at least independent of the circumstances of his liability to the creditor at law. For instance, in *Parsons v. Freeman*, he was held to have made the encumbrance his own personal debt, although it was admitted he had not made himself liable to the mortgagee at law, and on the other hand, in many cases, *Tankerville v. Fawcett*, *Shafto v. Shafto*, *Mattheson v. Hardwicke*, *Hedges v. Hedge*, *supra*, he was held not to have made the encumbrance his personal debt, although he had made himself liable to the owner of it at law. But the court joined them both together, and Lord THURLOW's argument while at the bar was precipitated as the law of Pennsylvania. It was followed in *Lennig's Estate*, 2 P. F. Smith 137. The decedent had bought the premises "in consideration of \$20,000 lawful money of the United States paid, &c., and of the assumption of the said F. Lennig of the two mortgages hereinafter particularly mentioned." And in the receipt the assumption of the two mortgages was mentioned as a part of the purchase-money. The court held that the mortgages should be paid out of the personal estate, relying upon *Hoff's Appeal*, *supra*, of which AGNEW, J., said, "It is there held that where the purchaser paid the full price of the land by including the encumbrances which he assumed to pay as the entire consideration of the premises, the purchaser made the debt his own, both as it regards the mortgagor

and mortgagee, and that an action would lie for the mortgagee against the purchaser for the amount of his encumbrance retained out of the price." *Metzgar and Gernert's Appeal*, 21 P. F. Smith 330, need only be noted in this connection as decided upon very obvious principles, without involving any special discussion of the point now under consideration. The following passage is quoted simply to show that SHARSWOOD, J., did not lose sight of the qualifying phrase, the force of which escaped Judge STRONG in *Woodward's Appeal*, *supra*. "That George Steininger, Sr., was personally liable for the Metzgar dower is undisputed. His deed to his son, George Steininger, Jr., for the land upon which it was an encumbrance subject to that dower *as between him and the vendee* made it the debt of the latter."

It would be impossible to reconcile with previous and subsequent decisions of the same court the purely *obiter* observations in *Hoff's Appeal* and *Lennig's Estate*, which were cases of administration, about the direct liability of the purchaser of property under and subject to the payment of a mortgage to the mortgagee at law. The circumstance seems to have been overlooked in them that in order that a third party may sue on a promise made to another for his benefit, it must have been not incidentally so but for his especial benefit. A trust must, as it were, be declared for him by the promisee's giving to or leaving in the hands of the promisor money or goods for his benefit: *Blymire v. Boistle*, 6 Watts 182; *Hind v. Holdship*, 2 Id. 104; *Vincent v. Watson*, 6 Harris 96; *Beer v. Robinson*, 9 Barr 229; *Campbell v. Lacock*, 4 Wright 448; *Torrens v. Campbell*, 24 P. F. Smith 471; *Nelson v. Blight*, 1 Johns. Cas. 205; *Weston v. Barker*, 12 Johns. 276.

Indeed under the last judicial statement of the principle in Pennsylvania, it would seem impossible to apply it in favor of a mortgagee: *Kountz v. Holthouse*, 5 W. N. C. 463. MERCUR, J.: "The general rule is that an action on a contract, whether express or implied, must be brought in the name of the party in whom the legal interest in such contract was vested: 1 Chit. Plead. 2. Yet many cases are to be found in which the right of a third person to sue has been sustained on a promise made to another. Hence, if one pay money to another for the use of a third person, or having money belonging to another, agree with that other to pay it to a third, an action lies by the person beneficially interested. This right of action is not restricted to cases of money only, but extends

to an agreement to deliver over any valuable, so that such third party is the only party in interest. But when a debt already exists, a promise by a third person to pay such debt being for the benefit of the original debtor and to protect him against it, he must necessarily have a right of action against his promisor to secure that protection. If the third person also become liable to the original creditor, he would be subject to two separate actions at the same time, and for the same debt. This would be manifestly unjust." But until two cases to be considered presently were reported, the profession in Pennsylvania remained in a state of honest doubt whether the decisions in *Hoff's Appeal* and *Lennig's Estate* were to be restricted to cases of the administration of decedents' estates where similar language should be found, or whether the doctrine of indemnity was to be absolutely abandoned and the law adopted as now laid down in the state of New York. In *Moore's Appeal*, 36 Leg. Int. 96, the intestate had purchased premises "for the consideration of the sum of \$9500, * * * under and subject, nevertheless, to the payment of the aforesaid mortgage-debt of \$8500, and the interest due and to grow due thereon." The receipt was for \$9500, "being the full consideration-money above mentioned." The question was between the heir and the personal representative whether the intestate had not made the mortgage his own personal debt so as to entitle the heir to be exonerated from it out of the personal estate. The Orphans' Court decided this question against the heir, saying, *inter alia*: "The result of the cases is this, that the promise of W. F. Moore, the decedent, as shown by his deed of purchase, was a promise of indemnity upon which his vendor would have recovered against the decedent only after payment by himself of the mortgage-debt, and upon which the mortgagee could not have maintained a personal action against the decedent." The Supreme Court affirmed the decree, SHARSWOOD, J., saying: "The question then is, did the decedent make this mortgage-debt his own so as to entitle his heir to call upon the personal estate to exonerate the land? An examination of the cases which have been decided on the legal effect of such a clause in a conveyance shows, we think, that unless there exist special circumstances to raise a covenant to pay the encumbrance, it amounts only to an indemnity to the vendor." In *Samuel v. Peyton*, 36 Leg. Int. 96, Wheeler, being the owner of a tract of ground, agreed to convey the same to Kressler for \$7500, and to advance him the further

sum of \$35,700, to build fifty houses thereon, Wheeler to be secured by a bond and mortgage on each house, the houses alone to be liable for the amount of the bonds, and neither Kressler nor his assigns to be personally liable therefor. To carry out this intention Wheeler conveyed the land to Pierie, a man of straw, who executed the fifty bonds and mortgages to Wheeler, and then conveyed the premises to Kressler. The plaintiffs, by divers assignments, became the owner of one of these bonds and mortgages, and the defendant, by divers conveyances, the owner of the premises, under and subject to the payment of it. The plaintiff sold the premises under the mortgage, and brought an action of assumption against the defendant, who had ceased to have any title or interest therein, for the deficiency. The defendant pleaded specially the agreement between Wheeler and Kressler that the latter and his assigns should not be personally liable upon the bonds, to which the plaintiff demurred, and the court below sustained the demurrer. The Supreme Court reversed the judgment, SHARSWOOD, C. J., saying: "In Moore's Appeal, which has just been decided, it has been held by this court that the conveyance of land 'under and subject' to a mortgage or other encumbrance, is of itself a covenant of indemnity only for the protection of the vendor. It was shown in that case, on a review of the authorities, that it was only where there was an express agreement to pay the encumbrance, or where such agreement might be implied from the circumstances, that there was liability to the encumbrancer, or that he could sue in the name of the vendor to his use. The vendor must sue, and must show that he has been damnified; or at least must show that his danger of damnification is imminent. The special pleas in this case not only expressly denied any agreement by the defendant to pay the mortgage, but averred a state of things which showed that his vendor never could be damnified. If it was expressly agreed that the first grantee from the party creating the encumbrance should not be personally liable, it is evident that no subsequent grantee could become so without his own express agreement. The first link in the chain by which a subsequent grantee might be called upon to indemnify his vendor would be wanting. On the demurrer to the special pleas of the defendant, we think he was entitled to judgment."

These cases deliberately adopt, as the law of Pennsylvania, the theory that the purchaser of premises under and subject to the

payment of a mortgage does not make it his personal debt, but only undertakes to indemnify his grantor, and that he cannot therefore be made directly liable in assumpsit to the mortgagee.

Finally, so far is the doctrine from public approbation that an Act of June 12, 1878, has been passed to destroy the responsibility of the grantee in its unqualified shape, and to rest what is left of it upon the doctrine of indemnity.

In Massachusetts, the liability of the grantee who assumes encumbrances, is that of indemnifying his grantor: *Pike v. Brown*, 7 Cush. 133; *Brannan v. Dowse*, 12 Cush. 228. And the mortgagee, for want of privity, cannot maintain an action against such grantee: *Miller v. Whipple*, 1 Gray 31. The language of *Tumas v. Durgin*, 119 Mass. 500, was not intended to disturb either of these principles, as may be seen by reference to *Pettee v. Pennard*, 120 Mass. 522. And in the administration of the estate of a decedent who has bought subject to a mortgage forming part of the consideration, the mortgage will remain charged upon the realty, unless the will manifest an intention that it shall be paid out of the personalty: *Hewes v. Dehon*, 3 Gray 205; *Andrews v. Bishop*, 5 Allen 491.

In Connecticut, the purchaser of an equity of redemption incurs no liability for encumbrances: *Post v. Bank*, 28 Conn. 433. But if he agree to buy subject to the encumbrance, and it is deducted from the purchase-money, he will be held to have undertaken to indemnify his grantor: *Townsend v. Ward*, 27 Conn. 614. In *Foster v. Atwater*, 42 Conn. 250, the mortgagee was allowed to sue the grantee who had assumed the mortgage directly, but not from any principle of privity, but because the grantee having assigned to him all his right of action, he was allowed by statute to proceed in his own name.

In Iowa, the purchaser of an equity of redemption is not held liable for the mortgage-debt: *Johnson v. Morrell*, 13 Iowa 300; but when he has assumed it, he is subject to the same rules of law as ultimately adopted in New York: *Corbet v. Watsman*, 11 Iowa 86; *Moses v. The Clerk*, 12 Id. 139; *Thompson v. Bertram*, Id. 476; *Scott's Adm'r v. Gill*, 19 Id. 187; *Bowen v. Kuntz*, 37 Id. 240; *Ream v. Jack*, 44 Id. 325.

See also Story's Eq. Jur., vol. 1, sec. 574-576; vol. 2, sec. 248; Thomas on Mortgages, ch. 9 and 15; Jones on Mortgages Ch. 15-17.

A loan upon mortgage in its nature differs little from any other loan upon collateral; the mortgagee having and keeping as his security for the loan the personal responsibility of the borrower, and the value of the real estate collateral, which he has thought proper to accept. The way in which this security may be increased under the New York rule, at every transfer of the encumbered premises, by the personal responsibility of the purchaser, seems unreasonable: and to allow him without resorting to the premises, a right of action for the whole debt against any one in the line of title, independent of the agreements such person may have with his grantor, seems quite inconsistent with ordinary legal principles. The more the subject is investigated, the more will the rule commend itself, that the promise of the grantee is directly for the benefit of his grantor, is merely to indemnify him from the debt, and gives the mortgagee no rights whatever at law, and only in equity an opportunity, after a sale of the premises, to avail himself of this duty so long as it is owed to the mortgagor, and no longer.

H. G. W.

RECENT ENGLISH DECISIONS.

High Court of Justice; Queen's Bench Division.

EASTLAND v. BURCHELL.

The authority of a wife to pledge the credit of her husband, is not an inherent but a delegated authority. If she binds him it can only be as his agent.

Where a wife leaves her husband without cause she carries no implied authority to bind him even for necessaries; but when she is driven away by his fault, he is bound to maintain her elsewhere, and she becomes of necessity his agent to supply her wants upon his credit. In such case only is the question of the adequacy of an allowance or the suitability of the goods furnished as necessaries, open to the jury.

Where, however, husband and wife separate by mutual consent, the terms on which the separation is made are binding on them so long as it lasts; and if one of the terms fixes the amount of the wife's income, she has no authority to pledge her husband's credit for necessaries in the event of such income proving insufficient.

THIS was an appeal from the Tunbridge County Court on a case stated for the opinion of the court.

The action was brought by the plaintiff, a butcher, against the defendants, who were husband and wife, for 38*l.* for meat supplied to the wife, who at the time was living separate from her husband.

The County Court judge gave judgment in favor of the plaintiff against the husband for the whole amount.

The husband appealed from this judgment, and on the appeal raised a question as to the rejection of evidence at the trial. The facts relating to this latter point will be found in the judgment.

Watkin Williams, Q.C., for the appellant.—A wife has no authority to pledge her husband's credit when separated from him, such separation being by mutual consent, and arrangements as to the income of the wife suitable to the position of the parties having been made: *Jolly v. Ress*, 15 C. B. N. S. 628. It is for the plaintiff to show that agency existed between the husband and wife. As to the question of evidence, it is clear from *Cobbett v. Hudson*, 1 E. & B. 11, that a man may be witness and advocate in the same cause: see note to *Manby v. Scott*, 2 Smith's Leading Cases 429.

Kingsford, for the respondent.—As to the second point, the judge was right in refusing the evidence of the advocate; it could only be hearsay. As to the principal question, when parties separate by consent, the question of sufficiency of allowance is for the jury. If it be not paid or inadequate, the husband is responsible for necessaries supplied to the wife. This principle runs through all the decided cases: see Addison on Contracts, 7th ed. 135; also *Hodgkinson v. Fletcher*, 4 Camp. 70; *Hunt v. De Blaquiére*, 5 Bing. 550; *Nurse v. Craig*, 2 B. & P. N. R. 148; *Johnston v. Sumner*, 3 H. & N. 261; *Biffin v. Bignell*, 7 Id. 877.

The judgment of the court was delivered by

LUSH, J.—The questions arising in this appeal are, first, whether the appellant is liable for butcher's meat supplied to his wife between the 13th of March and the 3d of October 1877, under the circumstances stated in the case; and, secondly, whether the County Court judge was right in excluding the evidence of his solicitor, who tendered himself to prove from his personal knowledge what the exact income of the appellant was, the ground of rejection being that the solicitor was acting as advocate for him in the cause, and that he could only give hearsay evidence.

The appellant and his wife were married in 1850. On the 6th of January 1876, they separated by mutual consent, the appellant taking charge of the four elder children, the three younger ones remaining with his wife. By their marriage settlement all the property then belonging to the wife, together with the property which would come to her on the death of her mother, was settled to her separate use. A deed of separation was executed by which she

was to take and enjoy all articles of personal ornament and dress, and all property and income to which she then was or should thereafter become possessed or entitled, and the savings of all income. The appellant covenanted to pay to the trustee 5*l.* per quarter so long as the three children, or any of them, should be under the age of twenty-one years and continue to reside with her; the wife covenanted that she would maintain and educate the children out of her separate income and the 5*l.* per quarter, and not apply to the appellant for any further pecuniary assistance; and the trustee covenanted to indemnify him from all debts and liabilities thereafter to be contracted by the wife.

The parties continued to live separate under this arrangement, and the appellant had paid the 5*l.* per quarter up to a period subsequent to the accruing of the debt in question. The respondent had never known the appellant, and had only dealt with the wife subsequently to the deed of separation. He supplied the goods, supposing her to be a married woman, but without making any inquiries in the matter.

The only evidence on which the learned judge acted was that of the wife (it being admitted that the goods had been supplied), and she stated that she had been ever since the separation in receipt of her separate income, which brought in 297*l.* 15*s.* 2*d.* per annum, and the 20*l.* a year paid by the appellant, and that she found such income insufficient to enable her to maintain herself and such of her children as resided with her, and to educate them. The case states that she also gave evidence as to the position and income of the defendant prior to her separation, but does not state what that position and income were.

The learned judge decided upon this evidence that the income of the wife was insufficient for the maintenance and education of herself and the children under her care, and thereupon held, as a matter of law, that she had authority to pledge her husband's credit, and did pledge it to the respondent in respect of the meat supplied to her. We are of opinion that this ruling is erroneous. The authority of a wife to pledge the credit of her husband is a delegated, not an inherent authority. If she binds him, she binds him only as his agent. This is a well-established doctrine. If she leaves him without cause and without his consent, she carries no implied authority with her to maintain herself at his expense. But if he wrongfully compels her to leave his house, he is bound

to maintain her elsewhere, and if he makes no adequate provision for this purpose, she becomes an agent of necessity to supply her wants upon his credit. In such a case, inasmuch as she is entitled to a provision suitable to her husband's means, the sufficiency of any allowance which he makes under these circumstances is necessarily a question for the jury. Where, however, the parties separate by mutual consent they may make their own terms, and so long as they continue the separation these terms are binding on both. Where the terms are, as in this case, that the wife shall receive a specified income for her maintenance, and shall not apply to the husband for anything more, how can any authority to claim more be implied? It is excluded by the express terms of the arrangement. It is obviously immaterial whether the income is derived from the wife's separate property, or from the allowance of the husband, or partly from the one source and partly from the other. It is enough that she has a provision which she agrees to accept as sufficient. She cannot avail herself of her husband's consent to the separation, which alone justifies her in living apart from him, and repudiate the conditions upon which that consent was given. And it seems superfluous to add that no third person can claim to disturb the arrangement made between the husband and the wife, and to say that he will, by supplying goods to the wife on credit, compel the husband to pay more than the wife could have claimed, that is, the stipulated allowance. He can derive no authority from the wife which she is incompetent to give. We are, therefore, of opinion that any inquiry into the husband's means was irrelevant, and for that reason we abstain from saying more upon the second question than that, if evidence upon that point had been relevant, we see no reason why the evidence offered should be rejected.

We do not think it necessary to go through the various cases cited. They are no guides to us, except so far as they exhibit the principles on which the authority of a wife to pledge the credit of her husband rests. Upon that point they are conclusive to show that the capacity of a wife to contract debts upon the credit of her husband is derived from an authority either expressly or impliedly given by him. We need only refer to the two more recent cases of *Johnston v. Sumner* and *Biffin v. Bignell*.

We are not concerned to inquire whether in this or that particular case this principle has been rightly applied. We have only to

deal with the facts of this case, and applying the principle to them, we hold that the appellant is not liable for the debt contracted with the respondent.

Being satisfied that we have all the materials before us necessary for the determination of the question, it would be a useless expense to the parties to send the case back for a new trial. We, therefore, act upon the wholesome provisions of the Judicature Act, 1875, ord. 40, r. 10, and direct that the judgment for the plaintiff below be set aside, and judgment be entered for the appellant.

It may not be easy to reconcile all the decisions upon the subject of a husband's liability for his wife's contracts. In some of them the true ground of her authority—that of agency—may not have been kept distinctly in view. Indeed the prevailing custom among legal authors on contracts to treat the subject under the head of "Married Women" rather than under "Agency," where it more properly belongs, may have tended to mislead the reader as to the true source of her authority. But recognising now the doctrine in its fullest extent that a wife has not ordinarily, as wife, any original and inherent authority to charge her husband by her contracts—a power to endure so long as the relation endures—but that she can bind him only as ~~her~~ agent, express or implied—implied in fact, or implied in law—let us, for convenience sake, consider the subject in four classes of cases:

1. During cohabitation; 2. When she has left him through his fault; 3. When they separate by mutual consent; 4. When she leaves without just cause.

1. During cohabitation. And here we should exclude all those cases where an implied agency *in fact* is created, as by having paid former bills without objection, or when the husband sees or knows of the delivery and consumption of the goods without any disapprobation, or when in any way he ratifies and confirms his wife's purchases—for these circumstances might create a tacit agency, whether the purchases were made by a

wife, a son, or a servant. They, therefore, shed no true light upon the question we are now considering, viz., the extent of her implied agency in law. And many of the apparently conflicting cases on this subject may be reconciled on the ground that there was evidence of some tacit agency in fact.

It may therefore be assumed, that during cohabitation a wife has ordinarily a *prima facie* agency to purchase on her husband's credit, necessary supplies for herself and the family. This is based largely upon the fact that it is customary to intrust a wife with the management of the household affairs, and to that extent, tradesmen have a right *prima facie* to consider her authorized. The authorities on this point are so uniform as to render their citation unnecessary. And see *Jewsbury v. Newbold*, 26 L. J. Ex. 247 (1857), not elsewhere reported; *Jolly v. Rees*, 15 C. B. (N. S.) 628.

But this agency is limited to articles that are reasonably necessary for her or the family, and does not extend to business contracts, nor to purchases of extravagant articles for herself or children, or gifts for her friends. See *Lane v. Ironmonger*, 13 M. & W. 367; *Seaton v. Benedict*, 5 Bing. 28; *Montague v. Benedict*, 3 B. & C. 631; *Philipson v. Hayter*, Law Rep. 6 C. P. 38; *St. John's Parish v. Bronson*, 40 Conn. 75; *Sutter v. Mustin*, 50 Ga. 242.

And the agency to purchase necessities even, is only *prima facie*, and may be disproved by the husband, by show-

ing that he had abundantly supplied the house with all things necessary and suitable; or that he had furnished his wife with ample ready money for the purpose, and requested her not to purchase on credit; or had provided suitable places where all things necessary could be had, and forbidden her to purchase elsewhere. The husband is still, in view of the law, the head of the house; and has a right to control the affairs of his own household. He has a right to say when and how his house shall be supplied, though of course he cannot repudiate his obligation altogether. But so long as he does his duty in this particular, there is no duty to be done for him by another, and therefore there is no one authorized by law to do it. The modern cases of *Woodward v. Barnes*, 43 Vt. 330; *Reid v. Teakle*, 13 C. B. 627; *Reneaux v. Teakle*, 7 Ex. 680; *Jolly v. Rees*, 15 C. B. (N. S.) 628; *Holt v. Brien*, 4 B. & A. 252; *Cromwell v. Benjamin*, 41 Barb. 560; *Heriott v. Baginli*, 9 Bosw. 578; *Richardson v. Dubois*, Law Rep. 5 C. P. 51; *Keller v. Phillips*, 39 N. Y. 351; 40 Barb. 390; *Burr v. Armstrong*, 56 Mo. 577; *Harrison v. Grady*, 12 Jur. (N. S.) 140; 14 Weekly Rep. 139; *Shoolbred v. Baker*, 16 Law T. Rep. (N. S.) 359; *Ryan v. Nolan*, Irish R. 3 C. L. 319, fully support these views, though doubtless there may be some authority the other way. *Ruddock v. Marsh*, 1 H. & N. 601, in which the husband was held liable for necessities supplied and consumed in his absence, although he had left sufficient money with his wife for that purpose, is apparently contrary to all sound rule on this subject.

2. Where she leaves him through his fault. Here she carries her implied agency with her, and has the same power to supply her own wants on his credit, as before. *Hancock v. Merrick*, 10 Cush. 41; *Mayhew v. Thayer*, 8 Gray 172; *Reynolds v. Sweetser*, 15 Id. 78; *Emery v. Emery*, 1 Y. & J. 501; Vol. XXVII.—53

Hultz v. Gibbs, 66 Penn. St. 360; *Houleston v. Smyth*, 3 Bing. 127; *Brown v. Ackroyd*, 5 El. & Bl. 819; *Harrison v. Grady*, *supra*; *Forristall v. Lawton*, 34 Law T. Rep. 903 (1876). But if he still furnishes her abundant means to do so, without pledging his credit, she has no right to use the money otherwise, and purchase on his name. And if the husband authorizes her to buy at certain places, where she can be suitably supplied, and forbids her to do so at some particular place, he has a right to do so, and is not bound by her contracts at that place, in violation of his express orders, when there was no reasonable need of her so contracting; certainly after notice of the facts to the party seeking to charge him. Her whims are not the criterion of her power, but her needs only, and he has a right still to dictate who his creditors shall be, provided always he does not unreasonably limit her in her range of choice. See *Mott v. Constock*, 8 Wend. 544; *Kemball v. Keyes*, 11 Id. 33; *Mizen v. Pick*, 3 M. & W. 481; where the husband was living apart from his wife in adultery, but allowed and paid her a sufficient sum for her maintenance, he was held not liable for her board and lodgings, though the plaintiff had no notice of the allowance. But if the allowance he makes her is inadequate, or if he does not pay it promptly, she still retains her agency to purchase on his credit. *Nurse v. Craig*, 5 B. & P. 148; *Baker v. Sampson*, 14 C. B. (N. S.) 382; *Collier v. Brown*, 3 F. & F. 67.

3. When they separate by mutual consent. And here the case of *Eastland v. Burchell*, no doubt, lays down the modern English rule. If she has by articles of separation deliberately agreed to accept a stated sum in full for her support, and stipulated not to contract on her husband's name, she cannot do so, even though the sum paid proves inadequate. Her agency is terminated. She has by her own act abrogated it.

And though the tradesman who supplies her is ignorant of the facts, yet he trusts her at his peril. She cannot give another rights she does not herself possess. See *Mallalien v. Lyon*, 1 F. & F. 431.

In *Johnston v. Sumner*, 3 H. & N. 261 (1858), the defendant and his wife had separated by mutual consent, and with the agreement that she should have 200*l.* a year, for her own use, which she had been receiving during her marriage under a covenant from her mother to that effect. The plaintiff had supplied her, on her own order, with dresses and articles of millinery to the amount of 160*l.*, without knowing she was married, and without making any inquiry about it, but having afterwards ascertained the fact, he brought an action against the husband for it. Upon these facts it was held there was no evidence to warrant a jury in finding for the plaintiff, and he was nonsuited, which was confirmed by the Court of Exchequer, upon the ground that the question was one of the wife's authority, that the creditor must make that out; that to do so, he must show, if they were living separate and apart, she was doing so under circumstances giving her an authority to pledge his credit, and if she had agreed to accept an allowance, which was paid, it was the plaintiff's duty to show such allowance inadequate, and that not being shown, there was no evidence to charge the husband.

In *Biffin v. Bignell*, 7 H. & N. 877 (1862), the husband allowed and paid his wife, as per agreement between them, twelve shillings a week, and she boarded with the plaintiff, who claimed 36*l.* for three months' board and lodging. BRAMWELL, J., told the jury that if the defendant's wife was living apart from him under an agreement by which she was to receive a weekly allowance, which was paid, she could have no authority to pledge his credit, and the defendant would be entitled to their

verdict. And this ruling was affirmed, BRAMWELL repeating that even if the provision was inadequate, the wife would have no such authority, so long as she lived apart under such a conditional assent on the part of the husband, conditional upon the fact that she would accept the provisions in full of all claim for support.

It is not clear the American rule goes quite so far. If the amount so paid is found adequate to her wants by the jury, it is clear she has no authority to go beyond it and purchase on credit. One of the earliest and best considered cases in America on this point is *Cary v. Patton*, 2 Ashm. 140, which agree with the English rule laid down in *Hodgkinson v. Fletcher*, 4 Camp. 70; *Holder v. Cope*, 2 C. & K. 437; *Reeve v. Conyngnam*, Id. 444; *Emmett v. Norton*, 8 C. & P. 506; where the adequacy of the allowance seems to have been considered material. And see *Fredd v. Eves*, 4 Harr. 385.

So it was held in *Pidgin v. Cram*, 8 N. H. 350, that where they separate by mutual consent, and the husband makes a contract with a suitable person, to support his wife in a suitable manner, she cannot leave that place without any just cause and pledge her husband's credit elsewhere for her support. And see *Stevens v. Story*, 43 Vermont 327. Though some hold that even in such case, if the wife has sufficient means of her own, she cannot purchase on her husband's credit; for if she chooses to live separate and apart, without his fault, and by mutual consent, she can only charge him in case of actual necessity; and if able, she must pay her own bills. See *Litson v. Brown*, 26 Ind. 489; *Dixon v. Harrell*, 8 C. & P. 717; *Liddlow v. Wilmot*, 2 Stark. 86; *Clifford v. Layton*, Mood. & Mal. 102; 3 C. & P. 15.

Of course if he does not promptly pay the stipulated allowance, she still retains her agency, as before. *Beale v.*

Arabin, 36 L. T. Rep. (N. S.) 249; not elsewhere reported, but a valuable case on the point. *Baker v. Barney*, 8 Johns. 372.

4. Where she leaves by her own fault. And here all agree she leaves her agency behind her, especially when she has committed adultery. No matter what her necessities may be, no matter how innocent or ignorant the person who supplies her may be of the circumstances of the separation, she has no power to bind her husband for even the

necessaries of life. *McCutchen v. McGakay*, 11 Johns. 281; *Cooper v. Lloyd*, 6 C. B. (N. S.) 519; *Henderson v. Stringer*, 2 Dana 292; *Hunter v. Boucher*, 3 Pick. 289; *Oinson v. Heritage*, 45 Ind. 73; *Bevier v. Galloway*, 71 Ill. 517. And this shows that her power does not spring solely and absolutely from her relation as wife—for she is such still—but from some other principle, which ought to be kept steadily in view in all these four classes of cases.

EDMUND H. BENNETT.

RECENT AMERICAN DECISIONS.

Supreme Court of Errors of Connecticut.

THE DELAWARE AND HUDSON CANAL CO. v. SAMUEL BONNELL ET AL.

A creditor who levies on an equity of redemption, and has the amount of the encumbrance allowed in his favor in the appraisal of the interest set off to him, cannot set up the invalidity of the encumbrance.

Whiteacre and Blackacre were mortgaged to A., and afterwards Blackacre to B., and still later Blackacre to C. B. foreclosed the mortgagor and C. upon his mortgage of Blackacre, and then redeemed both pieces by paying A.'s mortgage, taking a quit-claim from A. C. afterwards levied an execution against the mortgagor, upon the equity of redemption in Whiteacre, subject to the entire mortgage-debt to A., now held by B., and resting upon both pieces—the whole of that debt being allowed for in the appraisal of the equity levied on. Upon a petition brought by B. to foreclose the mortgagor and C. upon the mortgage of Whiteacre, originally made to A., it was held that C. was estopped from claiming that Blackacre should be charged with any portion of the mortgage-debt.

There was no merger of the mortgage interest acquired by B. in Whiteacre, because he had no superior estate in Whiteacre in which it could merge, and because, if he had, it was for his interest that it should not merge, and therefore presumably his intent that it should not.

BILL for a foreclosure, brought to the Superior Court in Fairfield county. Facts found by a committee, and decree of foreclosure passed by HOVEY, J. Motion in error by respondents. The case is fully stated in the opinion.

G. H. Watrous and *W. B. Stoddard*, for the plaintiffs in error, cited as to merger, *Lockwood v. Sturdevant*, 6 Conn. 390, and *Bassett v. Mason*, 18 Id. 136; and upon the point that a mort-

gagee will not be permitted to obtain more than his debt, *Findlay v. Hosmer*, 2 Conn. 353, and *Porter v. Seeley*, 13 Id. 564.

H. Stoddard, for the defendants in error.

PARDEE, J.—On the 27th day of February 1867, Thompson & Co., owning a tract of land in Bridgeport, divided into three lots, which have been designated as P, R and S, mortgaged S to P. T. Barnum for \$15,000. On April 17th 1869, Black, Wilson & Co., who had become the owners of the land, mortgaged P and R to the same person for \$9000; on May 20th 1869 mortgaged R and S to the Delaware & Hudson Canal Company, the petitioners, for \$40,000; and on October 4th 1870, mortgaged R and S to Bonnell, the respondent, for \$7000. In June 1872, the title of the Delaware and Hudson Canal Company to R and S became absolute by foreclosure. On December 5th 1872, they paid Barnum the amount of his mortgage upon S, being \$18,435.02, and also the amount of his mortgage upon P and R, being \$10,807.75, and he gave them a quit-claim deed of his interest in the three lots. In September 1873 Bonnell, having obtained a judgment against Black, Wilson & Co. for \$8445.76, levied his execution for that amount upon P, and caused all the right, title and interest of the debtors therein, subject to the Barnum mortgage, then amounting to \$14,035.60, to be set off to himself, their equity of redemption being appraised at \$8217.60. The Delaware and Hudson Canal Company having brought their petition to make their title to P absolute by foreclosure unless Black, Wilson & Co., or Bonnell, or some one of the various persons claiming an interest in it, will redeem, the Superior Court has decreed that unless those persons shall pay to the petitioners the whole of the above-named amount, they shall each and all be for ever barred and foreclosed. Bonnell has filed a motion in error, making specific assignment of errors as follows:

1. That the court erred in not ruling that the mortgage-debt, amounting to the sum of \$9000, known as the Barnum mortgage, was not fully satisfied and paid, and that it was such a mortgage-debt as could be foreclosed against the respondents.

2. In holding, under the circumstances of this case, that the merger of the mortgage interests and the equity of redemption in the petitioners, was not a satisfaction and payment of this mortgage-debt.

3. In holding that under the facts found, the petitioners were entitled to foreclose the respondents from that part of the mortgaged premises called P, unless the respondents paid the entire mortgage debt with interest.

4. In not holding that the respondent Bonnell could only be foreclosed on the \$9000 mortgage, of his interest in the tract P, by paying such a proportion of the mortgage-debt as the tract P bore in value to the entire mortgaged premises, P and R.

The plaintiff in error insists that he should be allowed to redeem upon payment of such proportion of \$14,035.60, as the value of P bears to the value of P and R; but, upon the trial, he offered no evidence as to the value of either lot, and has not furnished to the court any data for establishing that proportion. Moreover he has barred himself of the right to ask for any division. With full knowledge of all the facts, he caused his execution to be levied upon an equity of redemption in P, subject to the whole amount of the debt originally resting upon P and R; there was set to him the entire remaining estate, as that would only suffice to satisfy his demand; he now asks a court of equity to destroy the right of the petitioners to obtain their debt from P, having himself recognised its existence for the purpose of determining the proportion of the equity which he should take upon execution; he asks to be allowed to take property appraised at \$22,000, in satisfaction of a debt amounting to \$8445.76.

In *Lord v. Sill*, 23 Conn. 319, the petitioner had taken upon execution the whole equity of redemption in land, subject to three mortgages; he asked to be allowed to redeem upon payment of two of them, alleging the third to have been fraudulent. The court says: "If he was permitted to do this, under the title acquired by the levy of his execution, it is obvious that he would in this way acquire a title to real estate valued at more than a thousand dollars, without making any compensation for it, whatever. The plaintiff's argument is, that as that was a fraudulent mortgage, the defendant cannot set it up as against the plaintiff, a creditor of Hart, under whom they both claim. We think it a sufficient answer to this to say, that the defendant does not set up his fraudulent mortgage, but the plaintiff set it up and affirmed it by levying his execution expressly subject to it; and the defendant may well say to him, you have not taken or attempted to take the land represented by that mortgage, and therefore have no equitable claim to it, and

you must be willing to do what is equitable at the time when you are asking for equitable relief."

In *Waterman v. Curtis*, 26 Conn. 142, the petitioner having levied his execution upon an equity of redemption, prayed for relief against a mortgage, alleging that it was given to secure a debt tainted by usury. The court said: "But we are further of the opinion that the plaintiff, by his proceedings under his execution, is precluded from claiming in this case that less was due at the time of his levy on the mortgages of the defendants than the sum found due by the appraisers, and subject to which appraisal the plaintiff caused the equity of redemption to be set off to himself. * * * Pratt being a party to the mortgages, of course was, and it does not appear that the plaintiff was not, aware of the circumstances under which they were executed, and neither of them claimed before the appraisers on the plaintiff's execution that less should be allowed on them than the sum they were apparently given to secure; although it was plainly the interest of Pratt to reduce that amount in order to have the equity of redemption applied on the execution at an enhanced sum; and it was also the interest of the plaintiff to have it applied at its full value, unless indeed he may have supposed that he could, by allowing more on the mortgages than was really due on them, have the equity set off at an undervaluation and then reduce the mortgages on a bill like the present to redeem them. We think, however, that he could not do this, but that he must be held, as the case is now presented, to his levy as he has chosen to have it made."

In *Russell v. Dudley*, 3 Metc. 147, SHAW, C. J., says: "The creditor treating it as a subsisting mortgage is afterwards estopped to deny the existence of such mortgage; if he could afterwards avoid that mortgage and hold the whole estate, he might get it for a very inadequate consideration."

We are not called upon to determine that under no circumstances would a court of equity relieve P of a portion or even of the whole of the mortgage; for the purposes of this case Bonnell has determined the question in advance; he has specified the amount to which P shall be burdened, so far as he is concerned; he has said that the precise estate which he will take in it is that which remains after payment of the whole amount of the mortgage; and the decree is but a ratification of his own act. He has placed himself in the position of a purchaser with knowledge that the whole of an encum-

brance once resting upon P and R then rested only upon P; he paid just so much less for his estate in P than he otherwise would have been compelled to pay, and is not entitled to ask for contribution from R.

When in June 1872, the foreclosure of the mortgage to the Delaware and Hudson Canal Company was made absolute, they became the owners of the equity of redemption in R and S; their debt of \$52,000 against Black, Wilson & Co., which was represented and secured by that mortgage, was paid; by decree of court the equity was made to stand for that precise debt and for no other; if no one of those to whom the privilege of redemption was given chose to exercise it, the Delaware and Hudson Canal Company took the equity with the attendant possibilities as to an increase or diminution in value. But Barnum held a prior mortgage upon R and S, by means of which he could extinguish that equity; of necessity they paid him \$29,000 for his title to R and S, together with his title to P. Surely this last sum, paid six months after absolute foreclosure of R and S, did not enter into and was not represented by that decree; and as by it they already held the entire equity for \$52,000, it is not to be presumed that they paid \$29,000 more for a right, with the intent to merge and lose it in that which they already held. On the contrary, it is to be presumed, so far as R and S are concerned, that the mortgaged title purchased from Barnum is of value to them, certainly in securing the repayment of the money paid for it, possibly as fortifying what may prove to be a defective title to the equity, and it is a title which they may sell.

By virtue of his mortgage upon P, Barnum could have extinguished the equity therein; the Delaware and Hudson Canal Company bought this right for a valuable consideration; it is difficult to see how it has been destroyed in passing to them for value; equally difficult to see how Bonnell, as the owner of that equity under his levy, can destroy their right or force them to obtain the money which they paid for it from the equity in R and S, of which they had been for six months the absolute owners by decree of court for full consideration, to wit, a debt against Black, Wilson & Co.

And this purchased mortgage upon P, valuable as security for a debt, has not been lost by falling into a superior estate held by them therein, for they had none. It is not susceptible of being merged in their equity in R and S; the two rights concern differ-

ent pieces of land ; they cannot be brought into a state of legal coincidence ; and even if this were not so, in a case where it is so manifestly their right and for their interest to preserve their mortgage title to P intact, for the security of perhaps the whole, at least of a part, of the price paid therefor, a court of equity will not infer an intent to merge and lose it in the equity in R and S taken for another debt: *Lockwood v. Sturdevant*, 6 Conn. 373 ; *Mallory v. Hitchcock*, 29 Id. 127 ; *Hunt v. Hunt*, 14 Pick. 383 ; *Savage v. Hall*, 12 Gray 364 ; *Stanton v. Thompson*, 49 N. H. 277.

It is found in 1877 that in 1872 the joint value of R and S was \$100,000 ; that is about \$18,000 more than the aggregate amount of the debt due to the Delaware and Hudson Canal Company, and of the sums paid to Barnum for his mortgage upon P, R and S ; and Bonnell insists that, therefore, they have no equitable lien upon P.

He was a subsequent mortgagee of R and S ; he was made a respondent in the petition for foreclosure ; he had his day in court and opportunity for redemption ; he declined to avail himself of it ; presumably he did not regard it as a valuable privilege ; he preferred to allow them to take the chance of obtaining their debt from the property. It is also found that the appraised value of R and S in 1877 is only \$40,000. He is not, therefore, now in a position, as between himself and them, to force the mortgage resting upon P and R wholly upon R.

There is no error in the decree complained of.

Affirmed.

Supreme Court of Indiana.

GEORGE W. FRY v. THE STATE OF INDIANA.

The legislative authority of a state is the right to exercise supreme and sovereign power, subject to no restrictions except those of the state and federal constitutions, and the laws and treaties made thereunder.

A statute cannot be unconstitutional as impairing the obligation of any contract made after its passage.

A statute prohibiting the sale of railroad tickets by brokers or by any person, except by the regular agents of the railroads, or by a *bona fide* purchaser of an unused ticket or portion of a ticket, is not unconstitutional as granting an exclusive privilege or immunity. Such a statute is within the legitimate sphere of police regulations.

Nor is such a statute a regulation of commerce within the meaning of the federal constitution.

THIS was an indictment against the appellant, charging in substance, that the appellant, on the 9th day of January 1879, at and in the county of Marion, did then and there unlawfully barter and sell, for a valuable consideration, to wit, the sum of ten dollars, to some person whose name is to the grand jurors unknown, a railroad ticket, the description and date of which said ticket is to the grand jurors unknown, for the reason that said ticket is lost and cannot be found, entitling and evidencing the right of the holder thereof, to wit, the person whose name is to the grand jurors unknown as aforesaid, to travel and be transported over some railroad, the name and style of which said railroad is to the grand jurors unknown, running from the city of Indianapolis, in the county of Marion, and state of Indiana, to the city of St. Louis, in the state of Missouri. The grand jurors aforesaid, upon their oath aforesaid, do further present that, upon the said 9th day of January, A. D. 1879, at the time and place the said Fry sold said ticket as aforesaid to said person, whose name is to the grand jurors unknown as aforesaid, to wit, at the county of Marion and state aforesaid, said Fry was not then and there the agent of the railroad, whose name and style are to the grand jurors unknown as aforesaid, and said Fry was not then and there authorized to sell tickets or other certificates, evidencing the right of the holder thereof to travel and be transported upon said railroad, and he did not then and there have a certificate provided him by said railroad, setting forth his authority as agent of said railroad, signed by the managing officer of such railroad, and duly attested by its corporate seal; that said George W. Fry had not purchased the said ticket, evidencing the right of the holder thereof to travel and be transported by said railroad from the said city of Indianapolis, in the county of Marion, and state of Indiana, to the said city of St. Louis, in said state of Missouri, from an agent of said railroad authorized to sell tickets or other certificates, evidencing the right of the holder thereof to travel and be transported by said railroad, and provided with a certificate setting forth his authority as such agent to make such sales, signed by the managing officer of said railroad, and duly attested by the corporate seal of said railroad, with a *bona fide* intention of travelling on the same. Wherefore, the grand jurors aforesaid, upon their oath aforesaid, do further present and charge, that said sale of said ticket by said George W. Fry to said person, whose name is to the grand jurors aforesaid

unknown as aforesaid, and in manner and form aforesaid, was and is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Indiana."

The appellant moved the court quash said indictment, which motion was overruled and to this ruling he excepted.

The appellant's plea was not guilty.

The issues joined were tried by the court without a jury, upon an agreed statement of facts; and a finding was made by the court, that the appellant was guilty, as charged in the indictment. The appellant's motion for a new trial was overruled by the court, and to this decision he excepted; and judgment was rendered against him by the court on its finding, from which judgment this appeal was now prosecuted.

The principal parts of the statute were as follows :

Sec. 1. That it shall not be lawful from and after the taking effect of this act, for any officer or agent of any railroad company, steamboat, or other public conveyance of passengers for hire or reward, or for the operator or operators, manager or managers (or his or their agent or agents), of any such railroad, steamboat or other public conveyance, to issue or sell any pass, ticket, or coupon of a ticket, or certificate evidencing the holder's right to travel over or be transported in or upon such railroad, steamboat or other public conveyance, subject to any condition contained in or endorsed upon or appended to such pass, ticket, coupon or certificate, whereby the liability of such carrier shall be abridged or limited, or whereby the rights of the holder of such pass, ticket, coupon or certificate shall be decreased or abridged, unless such condition shall be printed in nonpareil type, or in type or characters as large or larger than nonpareil type. Any such officer, agent, operator or manager, or the agent of such operator or manager, who shall violate the provisions of this section of the act, shall, upon conviction thereof, be fined not less than \$10 nor more than \$100 for each pass, ticket or coupon which he shall issue or sell contrary to the provisions of this section. * * *

[Sec. 2. Provides that every railroad or other public conveyance for the transportation of passengers for hire or reward, shall provide each agent who may be authorized to sell tickets, etc., with a certificate setting forth his authority, etc.]

Sec. 3. It shall be the duty of the owner or owners, operator or operators of every railroad, steamboat or other public conveyance of passengers for hire or reward, to provide at each agency for the sale of tickets, for the redemption of the whole of any ticket or any part or parts, or coupon of any ticket which they may have sold and which the purchaser, for any reason, shall not have used, at the following rates, namely : where the whole ticket is presented for redemption, at the full price paid for the same, and when a part or coupon of the ticket only is presented for redemption, then the redemption shall be at a rate which shall be equal to the difference between the price paid for the whole and the cost of a ticket between the points for

which the part of said ticket was actually used; and the sale by any person of the unused portion of any ticket, otherwise than by the presentation of the same for redemption as aforesaid, shall be deemed to be a misdemeanor, and shall be punished by a fine of not less than \$5 nor more than \$50: Provided, however, that this act shall not prohibit any person who shall have purchased a ticket from an agent, authorized, as is by this act provided, with the bona fide intention of travelling on the same, from selling such ticket or any part or coupon thereof, to any other person, to be used in good faith by such person in travelling over such railroad or in or upon such steamboat or other public conveyance.

[Sec. 4. Makes violation of the statute by any owner, etc., of a public conveyance a misdemeanor.]

Sec. 5. It shall not be lawful for any person not possessed of the authority mentioned in the second section of this act, and not evidenced as therein provided for, to sell, barter or transfer, within this state, for any consideration whatever, the whole or any part of any ticket or tickets, passes, or other evidences of the holder's title to travel on or be transported in or over any railroad, steamboat or other public conveyance, whether the same be situated, owned or operated within or without this state, except as provided for in section three.

[Sec. 6. Makes it the duty of ticket agents to post their certificates of authority in a conspicuous place, etc.]

Sec. 7. Any person who shall violate any provisions of either the fifth or sixth sections of this act shall, upon conviction thereof, be fined not less than \$10 nor more than \$100.

The opinion of the court was delivered by

Howk, C. J.—Errors have been assigned by the appellant, in this court, which call in question the following decisions of the court below:

1. The overruling of his motion to quash the indictment.
2. The overruling of his motion for a new trial.

In their argument of this cause, in this court, the appellant's learned counsel have expressly waived all "technical objections" to the indictment. They do not claim, "that the grand jury had no legal authority to inquire into the offence charged;" nor do they claim, "that the indictment contains any matter which, if true, would constitute a legal justification of the offence charged, or other legal bar to the prosecution." But the appellant's motion was evidently founded upon the second statutory cause for quashing an indictment, namely, that the facts stated do not constitute a public offence." 2. R. S. 1876, p. 399, sect. 101.

The facts stated in the indictment, in this case, show very clearly, that it was intended to charge the appellant, therein and thereby, with a violation of the provisions of the fifth section of an act, enti-

tled "An act regulating the issuing and taking up of tickets and coupons of tickets by common carriers, and defining the rights of holders thereof, and other matters in relation thereto," approved March 9th 1875. 1 R. S. 1876, pp. 259 and 260.

It is earnestly insisted by the appellant's counsel that this entire statute is unconstitutional and void, upon the following grounds:—

1. Because it is in violation of section 8, of the first article of the Constitution of the United States, which provides:

"The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

2. Because "it is also an infraction of at least two provisions of the Constitution of Indiana: 1st. It impairs the obligations of contracts; * * * 2d. It undertakes to grant to carriers of passengers privileges and immunities which it does not extend to other citizens upon the same terms, or upon any terms whatever."

We will consider the appellant's objections to the constitutionality and validity of the statute, in the inverse of the order in which his attorneys have presented them.

It is the settled doctrine of the decisions of this court, that "the legislative authority of this state is the right to exercise supreme and sovereign power, subject to no restrictions except those imposed by our own constitution, by the federal constitution, and by the laws and treaties made under it. This is the power under which the legislature passes all laws:" *Beauchamp v. The State*, 6 Blackf. 299; *Doe v. Douglass*, 8 Id. 10; *The La Fayette, &c., Railroad Co., v. Geiger*, 34 Ind. 185. It must appear very clearly that the legislation is in conflict with some express provision of the constitution, or the statute will be upheld. It is claimed by the appellant that the statute above quoted is in conflict with that provision of the Bill of Rights, which declares that no law shall ever be passed "impairing the obligation of contracts." We fail to see this matter in the light in which the appellant's counsel have presented it. But if it could be said that the statute did impair the obligation of contracts existing at the time of its passage, the effect would be, as it seems to us, that as to such existing contracts the statute would be inoperative and of no effect, while it might be and would be, if no other objection existed, constitutional and valid as to all future contracts. The transaction on which the indictment in this case was predicated, occurred nearly

four years, as alleged, after the passage of the act in question ; and it cannot be said, we think, that the statute impaired the obligation of any contract in connection with that transaction. This objection to the constitutionality of the statute was not well taken, and cannot be sustained in any view of the question.

The second objection, urged by the appellants, to the validity of the statute, under our state constitution, is that it is in conflict with that section of the Bill of Rights, which declares that "the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." In discussing this objection, the appellant's counsel say of the statute : "It grants to any common carrier the exclusive right to purchase the unused portion of its tickets, and does not, under any circumstances, permit any other person to engage in the purchase thereof, and extends to said carriers immunity from all competition in the purchase and sale of such tickets. It simply is enabling a monopoly to be more exclusive." We do not think that this is a fair statement of the purport and effect of the statute. It does not grant a right to, but imposes a duty upon, the common carrier of passengers to purchase the unused portion of its tickets. It does not prevent but expressly allows the sale by the *bona fide* holder of such unused portions of tickets to any other person, to be used by such person in good faith, in travelling therewith. It prohibits a general brokerage business in the buying and selling of such unused portions of tickets, except under well-defined restrictions. The provisions of the statute, in this regard, are manifestly police regulations, and whatever may be said either for or against the justice or the wisdom of these regulations, it is certain, we think, that, in their enactment, the legislature did not exceed their legitimate power under our state constitution. It is neither the province nor the duty of the courts to call in question either the policy or wisdom of any act of legislation. The learned attorneys of the state have stated, clearly and explicitly, in their argument of this cause, some of the motives which may possibly have induced the General Assembly to enact the statute now under consideration. Without endorsing in anywise this statement, it may not be improper for us to set out, in this connection, a statement of the views of the representatives of the state, in this prosecution, as to the probable reason for the enactment of this statute. Counsel say, 'If the legislature believed that spurious

tickets were being put upon the market by means of brokers, of such kind as to make detection difficult, and in such numbers as to amount to a serious injury to the people or the railroad companies, or if they believed that their officers furnished a market for stolen tickets, and aided employers of the railroads or other persons in carrying on a nefarious business, and a business dangerous both to the railroads and their patrons, and if they further believed that the brokers were of little or no advantage to anybody, then they might well enact such a statute as this as the best means of correcting an existing evil. And if it seemed wiser to the legislature to strike directly at the brokers, and make their business unlawful, than to attempt to punish those who stole genuine or issued spurious tickets, they had the same right to take that course that they have to make a man a criminal who enters a house for gaming purposes, and thus assists gamblers, who are also criminals, in preying upon society."

In our opinion, the statute under consideration is not open to the second objection urged by the appellant's counsel against its validity, under the provisions of our state constitution.

We pass now to the consideration of the main ground of objection, presented by the appellant's attorneys, to the constitutionality and validity of the statute above quoted, namely, that it is in violation of section 8th of the first article of the constitution of the United States, which provides:—

"The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

In discussing this second objection to the statute under consideration, the appellant's counsel lay down the following propositions, with the purpose of establishing the same, in and by their argument:—

"1. That the word 'commerce,' as used in this section of the constitution, includes passenger travel, and hence any regulation of passenger travel is a regulation of commerce.

"2. That the power vested in Congress to regulate commerce, as applied to interstate passenger travel, is exclusive, and that the states have no power whatever to legislate upon this subject, even in the absence of legislation upon the part of Congress.

"3. That, conceding that the right to regulate commerce exists in the states, until Congress has exercised its powers in that behalf,

Congress has so far exercised that power as to preclude any action on the part of the states.

"4. That the statute does attempt to regulate passenger travel among the states, and hence is void ; and

"5. That such statute is not a legitimate exercise of the police power, which, confessedly resides in the several states."

We need not, in this opinion, consider or comment upon any of these propositions of the appellant's counsel, except the fourth and fifth. We do not think, that the first three of the five propositions, laid down by counsel, are in any manner involved in the case now before us. We recognise the constitution of the United States, and the acts of Congress pursuant thereto, as the supreme law of the land.

It may be conceded that the word commerce, as used in section 8, above quoted, of the first article of the federal constitution, includes within its scope and meaning interstate passenger travel; and that the power vested in Congress to regulate commerce, as applied to such travel, is so far exclusive in its character, as that the states may not, by any act of legislation, impose burdens upon either the carrier or the passenger, which would obstruct or hinder the free course of travel. Such we understand to be the purport and effect of the decisions of the Supreme Court of the United States, in construing the section above quoted. *Gibbons v. Ogden*, 9 Wheat. 1; *Passenger Cases*, 7 How. 283; *Henderson v. The Mayor, &c.*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 Id. 275; *Railroad Co. v. Hazen*, 95 Id. 465. In three cases, the doctrine is firmly maintained, that Congress has the exclusive power to regulate commerce, including interstate passenger travel; and in the case last cited, the court define the term commerce, and what is meant by a regulation of commerce, as follows: "Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it, or burden laid upon it, by legislative authority, is regulation."

From this definition of the term regulation, as applied to commerce, it would seem that a state statute, which placed no obstacle in the way of, and imposed no burden upon, interstate passenger travel, could not be said to "invade the domain of the national government," and could not, for that reason, be held to be unconstitutional and void. It cannot be said, we think, that the statute of this state, above quoted, in any manner impedes, obstructs, or

casts any burden upon, the free course of commerce, in so far as interstate passenger travel is concerned. The statute imposes certain prescribed duties upon common carriers of passengers and their agents, but the discharge of these duties does not and cannot, as it seems to us, obstruct or hinder, or cast any burden upon, the commerce of the country or interstate passenger travel. The act absolutely prohibits, and makes unlawful, the sale, barter or transfer, within this state, by any person not authorized thereunto as provided in said act, for any consideration whatever, of the whole or any part of any ticket or tickets, passes, or other evidences of the holder's right to travel, &c. That far forth, the provisions of the statute must be regarded, as we have already said, as police regulations, the evident object and purpose of which were to prevent and prohibit a general brokerage business in the purchase and sale of such tickets, &c., and the unused portions thereof. We fail to see, that these regulations are obstacles to, or burdens upon, interstate commerce, in any sense of that term.

In the case of *Railroad Co. v. Hazen*, *supra*, the Supreme Court of the United States says, "We admit that the deposit in Congress of the power to regulate foreign commerce, and commerce among the states, was not a surrender of that which may properly be denominated police power. What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health and safety. * * * * * It may also be admitted, that the police power of a state justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime, or pauperism. or disturbance of the peace." If, in the exercise of its police power, a state enacts certain regulations, which are neither obstacles to, nor burdens upon, interstate commerce, it cannot be said, we think, that such legislation invades the domain of legislation which belongs exclusively to the Congress of the United States; namely, because it relates to subjects which, to some extent, are connected with interstate commerce. For, as we understand the decision of the Supreme Court of the United States, in the case last cited, the state legislatures are prohibited, by said section 8, of the first article, of the federal constitution, from enacting such regulations only, in relation to interstate commerce, as would be either obstacles to, or burdens upon, such commerce. If this view of the matter under consideration is correct,—and we

think it is,—it follows very clearly that the statute of this state, above quoted, is not in violation of section 8, article 1, of the constitution of the United States, and is not, therefore, unconstitutional and void.

In the same section, of the same article, of the Constitution of the United States, it is also provided that "The Congress shall have power * * * to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The power thus given was early exercised, and since has been continuously exercised, by Congress in the enactment from time to time of suitable laws for the purposes indicated. The power thus exercised is exclusive, in its origin and nature, as the power to regulate foreign or interstate commerce. In *Ex parte Robinson*, 2 Bissell 309, it was held by DAVIS, J., then a learned and eminent justice of the U. S. Supreme Court, presiding in the U. S. Circuit Court, in this district, as follows: "The property in inventions exists by virtue of the laws of Congress, and no state has a right to interfere with its enjoyment, or to annex conditions to the grant. If the patentee complies with the law of Congress on the subject, he has a right to go into the open market anywhere within the United States and sell his property." This court adopted and followed the doctrine of the case cited, in *Helm v. The First National Bank of Huntington*, 43 Ind. 167, and in *The Grover & Baker Sewing Machine Co. v. Butler*, 53 Id. 454.

In the recent case of *Patterson v. Kentucky*, decided by the Supreme Court of the United States, in February 1879, the exclusive power of Congress to legislate, on the subject of property in inventions, was claimed by the plaintiff in error, and that a statute of Kentucky, which imposed a fine on any one who should sell for certain purposes a certain patented article, possessed of certain qualities, was unconstitutional and void, because it was inconsistent with the federal constitution, and the laws of Congress pursuant thereto. In an able and exhaustive opinion, Mr. Justice HARLAN lays down the doctrine, in that case, that "obviously" the right of a patentee, under the constitution and laws of the United States, "is not granted or secured, without reference to the general powers which the several states of the Union unquestionably possess, in reference to their purely domestic affairs, whether of intern-

commerce or of police." The learned judge quotes with approval and, to some extent, grounds his opinion upon, the following excerpts from Mr. Cooley's excellent Treatise on Constitutional Limitations, to wit: "In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual states and cannot be assumed by the national government. * * * If the power extends only to a just regulation of rights with a view to the due protection and enjoyment of all, and does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the state, and its exercise for the regulation of the property and actions of its citizens, cannot well constitute an invasion of national jurisdiction, or afford a basis for an appeal to the protection of the national authorities." Page 574. In the case cited, it was held by the Supreme Court of the United States, that the Kentucky statute was a police regulation within the power of the state, and was not in violation of the constitution and laws of the United States. We have cited the case, in this connection, not because it is directly in point, but because it contains the latest expression we have seen, of the views of the Supreme Court of the United States upon subjects which are, at least, closely allied to the questions involved in this case. Of course, in so far as the doctrine of the case cited is in conflict with the decisions of this court, in the cases above cited or any other cases, in our reports, the latter cases must be and are overruled.

In the case at bar, our conclusion is that the statute of this state, above quoted, is not in conflict with the constitution or laws of the United States, but was a legitimate exercise by the state legislature of the police powers of the state. Therefore, we hold that no error was committed by the court below, in overruling the appellant's motion to quash the indictment.

No point is presented for decision, by the appellant's counsel in argument, arising under the alleged error of the court, in overruling the appellant's motion for a new trial. That error, even if it existed, must therefore be regarded as waived.

The judgment is affirmed, at the appellant's costs.

Supreme Court of Wisconsin.

FRITZ STEFFEN v. THE CHICAGO AND NORTHWESTERN
RAILWAY COMPANY.

Negligence is not to be presumed in the absence of evidence tending to prove it. A party charging negligence as the ground of his action takes the *onus probandi*. But the nature of the injury may in some cases raise a presumption of negligence.

A servant who engages in the performance of services for compensation, does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services. But where there are latent risks which are known to the master it is his duty to notify the servant. And when they arise from no negligence of the master but are incident to the nature of the service, and unknown to the master through no negligence of his, the risk is with the servant, not with the master.

APPEAL from Dane county.

Jones and Parkinson, for respondent.

Smith and Lamb, for appellant.

RYAN, C. J.—The respondent brought his action for the appellant's negligence, and it was incumbent on him to establish it. Negligence is not to be presumed in the absence of evidence tending to prove it. A plaintiff charging negligence as the ground of his action takes the *onus probandi*. The nature of an injury may indeed, in some cases, raise a presumption of negligence. But the respondent's injury is not of such a character. He established no cause of action without evidence tending to show the appellant's negligence in causing his injury: Wharton's Neg., sect. 421; *Morrison v. P. & C. Construction Co.*, 44 Wis. 405; *Nitro-Glycerine Case*, 15 Wall. 524.

As the respondent's evidence left the case, his injury appeared the result of unaccountable accident. There was no evidence tending to show where the stone which struck him came from, or how or by what it was put in motion. The whole body of the evidence rendered it most improbable, indeed nearly or quite impossible, that it could have come from that part of the track between the rails, by force of the passing train. All the gravel on that part of the track appears to have been several inches below the cow-catcher, the lowest part of the train. And there was nothing to show that the stone could have come from that part of the track outside of the rails. The cause of the accident rested in pure conjecture, without evidence tending to explain it or to connect it

in any way with any negligence of the appellant. At the close of the respondent's evidence it appeared to be a case of unaccountable misadventure, for which no one was responsible: *Harvey v. Dunlap*, Suppl. to Hill & Denio 193; *Brown v. Kendall*, 6 Cush. 292; *Nitro-Glycerine Case*, *supra*; and a nonsuit ought to have been granted when the respondent rested.

The appellant, however, gave evidence of some experiments tending to account for the injury. These experiments raise some presumption, perhaps a strong one, that the stone came from the outside of the rail, next to and nearly or quite directly opposite the respondent where he was struck. It appears that such stones, placed on the head of a spike and rested against the outside of the rails, were several times driven by a passing train, at a right angle or nearly so from the rail, with force enough to cause such an injury at such a distance. If these experiments do not account for the accident, it still remains unaccountable. And the case will be considered on the presumption which the experiments raise.

The negligence imputed to the appellant is the failure of the boss of some workmen, of whom the respondent was one, to remove the stone upon the approach of the train, so that the injury could not have occurred. If the boss of a gang of mere laborers, himself little or no more, should be held chargeable with notice of such a danger, the law would impute to him knowledge of a law of motion quite new to every member of the court upon the argument of this appeal. But the evidence *prima facie* establishes that, if leaving such a stone in such a place were negligence, it was the negligence of the respondent himself.

The learned counsel for the respondent dwelt much upon the duty of the appellant to keep its track in order. There is no necessity to insist upon the duty of a railroad company to keep its track in good order, for the purposes for which it is built; the safe passage of trains. And these workmen appear to have been employed to perform this very duty for the appellant, at the *locus in quo*. The track had been raised, and the men were engaged in ballasting it with gravel lying at the side of the track. It appears to have been the duty of each man so employed to shovel gravel upon the track in front of him, until there should be enough so shovelled up as to need levelling on the track, and thereupon to level it from time to time, as might be necessary; each workman for himself, to the extent of his own work. This appears to have

been mere labor, not skilled labor in any sense. And the office of the boss appears to have been chiefly or wholly to see that the men under him performed their duty.

Assuming the theory of the experiments, the stone which injured the respondent was, in the absence of evidence to the contrary, presumably thrown up by himself, in his own immediate front; and if it should have been removed from the tie, it was his own duty to remove it. Indeed it seems to have been impracticable for the boss of the work to examine the work in detail, at the approach of trains, in order to guard against such possibilities as the one in question, without keeping his men idle a great part of their time. His first and paramount duty of supervision was to see the track safe for passing trains. And before the happening of this accident no rule of ordinary care could well have required him to inspect the track outside of the rails, at the approach of every train.

The relation of master and servant does not imply the master's guaranty of the servant's safety. "A servant," says BLACKBURN, J., in *Morgan v. Railway Co.*, 5 B. & S. 570, "who engages in the performance of services for compensation, does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services." This rule is universal: Wharton's Neg., sect. 201, 205; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Priestly v. Fowler*, 3 Mees. & Wels. 1; *Riley v. Baxendale*, 6 Hurlst. & N. 445; *Woodley v. Railway Co.*, Law Rep. 2 Ex. 384; *Gibson v. Railway Co.*, 68 N. Y. 449; *Hayden v. Man'fg Co.*, 29 Conn. 548; *Ladd v. Railroad Co.*, 119 Mass. 412.

There may be latent risks in an employment. Where these are known to the master, it is his duty to notify the servant. But when they arise from no negligence of the master, but are incident to the nature of the service, and unknown to the master through no negligence of his, the risk is with the servant; not with the master: Wharton's Neg., 206-211.

Whether the injury of the respondent arose from unaccountable accident, or from an occult risk incident to his employment, the respondent is not entitled to recover. And the appellant's second motion for a nonsuit, at the close of the evidence, should have been granted.

The judgment is reversed and the cause remanded to the court below for a new trial.

Supreme Court of New Brunswick.

ARMSTRONG v. THE GRAND TRUNK RAILWAY CO.

Goods were delivered to the defendants at Montreal, for which they gave the following receipt: "Montreal Station, July 26th 1873. Received from D. Bell the under-mentioned property, addressed to John Armstrong, St. John, N. B., to be sent by the Grand Trunk Railway Co., of Canada, subject to the terms and conditions stated on the other side." [Then followed the description and marks of the goods.] The conditions printed on the back of the receipt were, *inter alia*, that the company would not be responsible for damages occasioned by delays from over-pressure of freight, or from fire; and that goods addressed to consignees at points beyond the company's stations, and respecting which no directions to the contrary should have been received at those stations, would be forwarded to their destination by public carrier, or otherwise, as opportunity might offer, without any claim for delay against the company for want of opportunity to forward them; or they would, at the discretion of the company, be placed in their warehouse, pending communication with the consignees, at the risk of the owners, for any damage arising from any cause whatever. The goods were sent from Montreal by the defendant's railway to Portland, Maine, the terminus of their line, and stored in their warehouse there, where they were accidentally destroyed by fire on the 9th of August. It was not shown when they reached Portland, but it was proved that goods received at Montreal on the 29th of July would arrive at Portland about the 4th or 5th of August by freight train, and that freight for St. John arriving at Portland was generally forwarded by steamboats, which ran three times a week; and in 1873 there was an agreement between the railway company and the steamboat company respecting the carriage of freight, but the particulars of it were not proved. There was no evidence about the payment of the freight on the goods: *Held*, 1. That the duty of the defendants as common carriers ended on the arrival of the goods at Portland, after which time they held them as warehousemen, and were not liable for their loss without proof of negligence. 2. That there was not sufficient evidence of negligence in not forwarding the goods from Portland before the fire. 3. That in the absence of evidence to the contrary, it would be presumed that Bell, the plaintiff's agent, had seen the conditions on the back of the receipt, and therefore the plaintiff was bound by them. 4. That even if a promise by their freight agent to pay for the goods would bind the company, a conditional promise to pay, if the goods were not insured by the plaintiff, would not be binding without proof of non-insurance.

THIS was an action on the case against the defendants as common carriers, for the loss of two cases of merchandise belonging to the plaintiff.

The plaintiff purchased the goods through his agent, Duncan Bell, by whom they were delivered to the defendants at Montreal, on the 26th of July 1873, and who received a bill of lading from the defendants, in the following words:—

"Special notice. The company will not be responsible for any goods missent, unless they are consigned to a station on their railway. Rates and weights entered on receipts or shipping bills will

not be acknowledged. All goods going to or from the United States will be subject to customs charges, &c.

GRAND TRUNK RAILWAY."

"Montreal Station, July 26th 1873. Received from Duncan Bell, the undermentioned property, in apparent good order, addressed to John Armstrong, St. John, N. B., to be sent by the Grand Trunk Railway Company of Canada, subject to the terms and conditions stated above, and upon the other side, and agreed to by this shipping note delivered to the company at the time of giving the receipt therefor." [Then followed the description and marks of the goods.]

The conditions referred to, printed on the back of the receipt, so far as they relate to this case, were as follows:—

"General notices and conditions of carriage. It is understood and agreed that the Grand Trunk Railway will not be responsible * * * (3) for damages occasioned by delays from storms, accidents, overpressure of freight, or unavoidable causes, or for damages from the weather, fire, heat, frost or delay of perishable articles, or from civil commotion.

"(10). That all goods addressed to consignees at parts beyond the places at which the company have stations, and respecting which no directions to the contrary shall have been received at these stations, will be forwarded to their destination by public carrier, or otherwise, as opportunity may offer, without any claim for delay against the company for want of opportunity to forward them; or, they will, at the discretion of the company by whom they may have been received, be suffered to remain on the company's premises, or be placed in shed or warehouse (if there be convenience for receiving the same), pending communication with the consignees, at the risk of the owners, for any damage arising from any cause whatever, * * * and in case of loss or damage to any goods for which the company may be liable, it is agreed and understood that they shall have the benefit of any insurance effected by, or for account of the owner of the said goods, before any demand shall be made."

The goods were sent from Montreal by the defendant's railway, to Portland, Maine, the terminus of the railway, and were stored in their warehouse there, and were destroyed by fire on the 9th of August, when a considerable part of Portland was burnt. The fire occurred without any negligence on the part of the defendants. It did not appear when the goods reached Portland, but it was

proved that goods received at Montreal on the 29th of July, would arrive in Portland about the 4th or 5th of August in ordinary course by freight trains ; and that goods sent from Montreal by that line, and thence to St. John by steamboat, did not generally reach St. John in less than a fortnight. Freight arriving at Portland by the Grand Trunk Railway, was generally forwarded to St. John by the boats of the International Steamboat Company. It was stated, that in 1873 there was a written agreement between that company and the defendants, respecting the carriage of freight, but the agreement was not proved. The boats of the International Steamboat Company ran three times a week between Portland and St. John, and in August 1873, were carrying a good deal of freight, being sometimes crowded with it. Some correspondence took place after the fire, between the plaintiff and the defendants' freight agent in which the latter stated, that the company would pay for the goods if they were not insured, of which there was no evidence.

At the close of the plaintiff's case, it was agreed that a verdict should be entered for the plaintiff for the value of the goods, subject to leave to the defendants to move to enter a nonsuit, and that the following questions should be left to the jury :

1. Were the defendants guilty of negligence in not forwarding the goods to the plaintiff at St. John, before the fire on the 9th of August.

2. Were the conditions of the way-bill brought to the knowledge of Duncan Bell by the defendants ?

3. Did the defendants, by their agent, Stevenson, with full knowledge of the facts, promise, after the fire, to pay the plaintiff for the goods ?

The jury answered the first and third questions in the affirmative, and the second in the negative.

The opinion of the court was delivered by

ALLEN, C. J.—The first question which arises in the case is, when did the defendant's liability as common carriers end ? Did it continue until the goods arrived at St. John, or did it end in Portland, the terminus of their line of railway ? And did the defendants contract to carry the goods from Montreal to St. John ?

We think their liability as carriers ended at Portland, and if they incurred any liability after the arrival of the goods there, it must be in some other character than that of common carriers.

Prima facie, the defendants were only common carriers between Montreal and Portland, and their liability as such, for the safety of the goods, would cease when they arrived there, unless it was shown that they became carriers beyond that, and did not limit their responsibility to the transit between Montreal and Portland. There is no evidence that they undertook to carry the goods beyond Portland, unless such an obligation arises from the way-bill or receipt which was signed when they received the goods; and we think it is very clear from the language of the 10th condition, that they intended to assume a different character in respect to their dealings with the goods after their arrival at Portland from that in which they stood before. They undertake that the goods shall be forwarded to their destination by public carrier, or otherwise "*as opportunity may offer*," and stipulate that they will not be responsible for any loss or damage to goods so sent, nor for any delay which happens beyond their line. In *Garside v. The Trent and Mersey Navigation Co.*, 4 T. R. 581, the defendants were carriers between Stourport and Manchester; they received goods directed to the plaintiff at Stockport, which they carried safely to Manchester, and put into their warehouse there, where they were accidentally destroyed by fire that night, and before any carrier came from Stockport to whom they could be delivered. It appeared that according to the course of business, when goods were sent from Stourport to go beyond Manchester, if any carrier to their place of destination was at Manchester ready to receive them, they were delivered to him on payment of the carriage to Manchester; but if not, the defendants kept them in their warehouse till a carrier arrived. It was held that the defendants had the goods as warehousemen, and not as carriers, and, therefore, were not liable for their loss.

In *Muschamp v. The Lancaster & Preston Railway Co.*, 8 M. & W. 421, the defendants were common carriers between Lancaster and Preston; at the latter place, their line joined the North Union Railway. They received a box from the plaintiff, to be carried to a place beyond Preston; it arrived safely at Preston, but was lost after being sent from thence by the North Union Railway. On these facts the judge directed the jury that where a common carrier took into his care a parcel directed to a particular place, and did not, by positive agreement, limit his responsibility to a part only of the distance, that was *prima facie* evidence of an under-

taking on his part, to carry the parcel to the place to which it was directed; and that the same rule applied, though the places were beyond the limits in which he in general professed to carry on his business of a carrier. This ruling was held by the Court of Exchequer to be correct. The same principle was affirmed in *Watson v. Ambergate Railway Co.*, 15 Jur. 448, where the defendants received a parcel to be conveyed to Cardiff, their line only extending to Nottingham, and they were held answerable for its loss, though it happened beyond their own line. So also in *Scott-horn v. South Staffordshire Railway Co.*, 8 Exch. 341. But in neither of these cases was there anything to show that the railway company intended to limit its responsibility to the terminus of its own railway, which, it was admitted, might have been done. In that respect, therefore, those cases are, in our opinion, distinguishable from the present case. The case of *Collins v. The Bristol and Exeter Railway Co.*, 11 Exch. 790, more nearly resembles the present case, and unless it can be distinguished, would certainly seem to support the plaintiff's contention that the defendants in this case undertook to carry the goods to St. John. In that case the plaintiff delivered goods to the Great Western Railway Company at Bath, one of their stations, to be conveyed to Torquay. He signed a receipt, headed, "The Great Western Railway Company, received the under-mentioned goods, on the conditions stated on the other side, to be sent to Torquay station, and delivered to the plaintiff or his agent." One of the conditions was, that the company would not be answerable for loss or damage by fire. Another condition stated, that the company would not be responsible for loss or damage to goods beyonds the limits of their railway, and (in terms very similar to the 10th condition here), that goods addressed to consignees beyond the limits of the company's railway, and respecting which no directions to the contrary should have been received, would be forwarded to their destination by public carriers or otherwise, as opportunity might offer. That the charges of such carrier would be added to those of the company; and the delivery of the goods by the company would be considered as completed, and their responsibility cease when the carriers received the goods for further conveyance. The Great Western Railway line ended at Bristol, and the defendant's line began there and extended to Exeter, where it was joined by the line of the South Devon Railway, which ran to Torquay. The goods were conveyed to Bristol by the Great Western Rail-

way and taken on in the same truck to Exeter, where they were accidentally destroyed by fire. The Court of Exchequer held that there was one contract with the Great Western Railway Company for the conveyance of the goods from Bath to Torquay, subject to the conditions in the receipt note, and consequently that they were not responsible, being protected by the condition against loss by fire. This decision was reversed in the Exchequer Chamber, 1 H. & N. 517, consisting of eight judges, who held, that the Great Western Railroad Company were not carriers beyond their line, and that they were discharged by forwarding the goods to be carried by the defendants, who received them as common carriers, and were liable for their loss, the clause of exemption against responsibility for loss by fire, not applying to them. From this judgment there was an appeal to the House of Lords: see *Bristol & Exeter Railway Co. v. Collins*, 7 H. Lords Cases 194, where the original judgment in the Court of Exchequer was affirmed on the ground that the contract was with the Great Western Railway Company alone, and that the Bristol and Exeter Company was not liable. The judges who were summoned to advise their lordships differed in their opinions, and even Lords WENSLEYDALE and KINGSDOWN expressed some doubt about the case. There were several circumstances which appear to have influenced the decision that there was an entire contract by the Great Western Railway Company for the carriage of the goods from Bath to Torquay. In the first place, the goods were sent on from Bristol in a truck belonging to that company, and a guard in their service was sent with them to Exeter. In the next place, the charge for the carriage of the goods for the whole distance from Bath to Torquay, was paid to the Great Western Railway Company, and was called the company's charges. And further, by the express terms of the receipt note, the goods were to be sent to Torquay station, and *delivered* to the consignee or his agent.

ALDERSON, B., delivering the judgment of the Court of Exchequer says, "They contracted in express terms, on the face of the receipt note, to carry the goods from Bath to Torquay." The bill of lading in the present case says nothing about the delivery of the goods, nor is there any express statement that they are to be carried by the defendants to St. John; but they are "to be sent by the Grand Trunk Railway Company, subject to the terms and conditions stated," which terms and conditions are, that they will be

forwarded from Portland to their destination by public carriers or otherwise, as opportunity may offer. It appears to us, that the condition endorsed on the bill of lading was intended for the express purpose of preventing the defendants from being held as common carriers beyond the termination of their line of railway; that they intended to limit their responsibility to that; and though they agreed to forward goods to places beyond the limits of their line, they stipulated, that in so doing, they would not themselves be the carriers, or incur the liabilities of carriers. Their agreement to forward the goods, as opportunity might offer, seems to be a different obligation from that which the law would impose on them as common carriers for the whole distance from Montreal to St. John. That they had a right to enter into such an agreement, there can be no doubt. Another distinguishing circumstance between this case and the case of *Collins v. The Bristol and Exeter Railway*, is, that there is no evidence here of any payment or agreement for payment of the freight to the defendants. The payment of one sum for the carriage of goods to a certain place, would, no doubt, be evidence of an undertaking by the company to carry to that place: *Wilby v. West Cornwall Railway Co.*, 2 H. & N. 703. There is no evidence here of the defendants' liability to carry the goods to St. John, unless it be found in the bill of lading, and that seems to us to exclude the idea, that in undertaking to forward the goods from Portland, they were discharging a part of their common law liability as carriers. The case of *Coxon v. The Great Western Railway Co.*, 5 H. & N. 274, is to the same effect as *Collins v. The Bristol and Exeter Railway Co.*, and in *Gordon v. The Great Western Railway Co.*, 34 U. Can. Q. B. 224, where it was held that there was one entire contract to carry goods from Cincinnati to Thorold in Canada, though the company's line ended at Detroit, the bill of lading was headed "contract for a through rate," and in the margin, the words "For Gordon, McKay & Co., Thorold, Ontario, *via* Detroit and Great Western Railway Company."

The courts of the United States hold that the liability of a railway company for goods received for transportation, is *prima facie* limited to the transitus over their own road; and, that in the absence of a special contract, they are not liable for a loss after the delivery of the goods to another company to be carried to their place of destination: *Nutting v. Connecticut River Railway Co.*, 1 Gray 502; Story on Bail. 538.

It was contended in this case, that admitting the meaning of the conditions endorsed on the bill of lading to be as we have stated, there was no evidence that these conditions were brought to the knowledge of Bell, the plaintiff's agent; and the jury have, no doubt, so found. It is, perhaps, difficult to reconcile all the cases which have arisen on this question of the knowledge of conditions printed on the back of tickets or bills of lading. In several of them, there was direct evidence of ignorance of the conditions; as, in *Henderson v. Stevenson*, Law Rep. 2 H. L. (Sc.) 470; *Harris v. Great Western Railway Co.*, Law Rep. 1 Q. B. Div. 575; and *Parker v. S. Eastern Railway Co.*, Law Rep. 2 C. P. Div. 416. In the first of these cases, there was no reference on the face of the ticket, to the conditions on the back, which distinguished it from the case of *Harris v. Great Western Railway Co.*, as pointed out by BLACKBURN, J.; and in *Parker v. S. Eastern Railway Co.*, BRAMWELL, L. J., differed from the other members of the court, being of opinion that the plaintiff, who knew that there was something printed on the back of the ticket, was bound by it, whether he had read it or not. And this agrees with what is said in *Van Toll v. The S. Eastern Railway Co.*, 12 C. B. N. S. 75; and *Stewart v. The London and N. Western Railway Co.*, 3 H. & C. 135, that a person must be presumed to know what he has the means of knowing, whether he avails himself of those means or not. The bill of lading here on its face, informed the plaintiff's agent that the defendants received the goods on certain conditions, and it is not open to the plaintiff now to say that he did not know what those conditions were.

In *Harris v. Great Western Railway Co.*, *supra*, BLACKBURN, J., says: "The ticket has on the face of it, a plain and unequivocal reference to the conditions printed on the back of it, and any person who read that reference could, without difficulty, look at the back and see what these conditions were; and that being so, the question comes to be, whether the plaintiff is not precluded from setting up, that Mr. Harris, who acted for her in taking the ticket, never looked at the face of it, or bestowed a thought on what the conditions were. In other words, whether by depositing the goods and taking the ticket, he did not so act, as to induce the defendants to enter into the contract with him in the belief that he had assented to its terms. I think he has so acted." The same principle will be found in the *York and Berwick Railway*

Co. v. Crisp, 14 C. B. 527; and in *Lewis v. McKee*, Law Rep. 4 Exch. 58.

In *Parker v. S. Eastern Railway Co.*, Law Rep. 2 C. P. Div. 416, MELLISH, L. J., admits that there may be cases where a party would be bound by the contents of paper delivered to him, though he had never read it; and he instances the case of a person who ships goods and receives a bill of lading signed by the master, who would be bound by the exceptions contained in it in favor of the shipowner. And why should not the same principle apply to a contract for the carriage of goods by land? There is abundant evidence, in the absence of any negative proof by Bell, that the conditions were brought to his knowledge, or, at least, that he had the means of knowing them, and, therefore, the plaintiff is bound by them. On this point the finding of the jury was clearly against the evidence. It was contended further, that even if Bell had knowledge of the conditions, the plaintiff is not bound by them, because common carriers cannot stipulate against liability for their own negligence. Admitting that, at the time the goods were destroyed, the defendants held them as common carriers, they clearly had a right to stipulate against a liability for loss by accident. A carrier may limit his common-law liability so as not to be responsible for a loss by fire, occasioned without negligence on his part. See *Pemberton v. New York Central Railway Co.*, 104 Mass. 144; *Hoadly v. Northern Transportation Co.*, 115 Id. 304; *New Jersey Steamboat Navigation Co. v. Merchants' Bank of Boston*, 6 How. 344; *Wyld v. Pickford*, 8 M. & W. 443; *Bristol & Exeter Railway Co. v. Collins*, 7 H. of L. C. 194; *Phillips v. Clark*, 1 C. B. N. S. 156; *Ohilff v. Briscall*, Law Rep. 1 P. C. 231. Now the fire by which these goods were destroyed, was not attributable to any negligence of the defendants; and, therefore, if they are liable at all for their loss, it is because they were guilty of negligence in not forwarding them to St. John at an earlier period. See *McCrosson v. Grand Trunk Railway Co.*, 23 U. Can. C. P. 107.

The evidence as to the time the goods arrived at Portland, and whether they could have been sent from thence by steamer before the 9th of August, when the fire occurred, was very loose and uncertain. Whether the burthen of proving negligence was on the plaintiff, or whether the defendants were bound to disprove it, would depend upon the character in which they held the goods at the time

of the loss—whether as carriers or as warehousemen, for the purpose of being forwarded to St. John, under the terms of the 10th condition. We are of opinion that they held them in the latter character, and that there ~~was~~ not evidence to warrant the jury in finding that they were guilty of negligence, on the first question submitted.

As to the promise of the defendant's freight agent to pay for the goods, we are inclined to think the evidence should not have been received. But, at all events, if the defendants could be bound by his promise, it was only conditional to pay if the goods were not insured by the plaintiff, and there was no evidence whether they were so or not: consequently, the finding on that point was also against evidence.

As, in our opinion, the evidence failed to make out the plaintiff's claim, a nonsuit must be entered according to the agreement at the trial.

Supreme Court of Nebraska.

KEFFELL v. BULLOCK.

The action of an infant must be brought by his guardian or next friend, who alone is liable for the costs. The infant is not liable to a judgment therefor.

Nor is he liable to a judgment for costs after arriving at full age, in an action brought without a guardian or next friend, but not terminated during infancy, if, on reaching his majority, at the first opportunity, he disclaim all benefit from the proceeding, and refuse to proceed further with the case.

An offer to confess judgment duly made in the court where the action is brought need not be renewed in the Appellate Court in order to be available to the party making it on final judgment.

By the legislation in Nebraska all the disabilities of infancy as they exist by the common law are fully recognised.

LAKE, J.—The defendant in error commenced an action in the County Court for Dodge county against the plaintiff in error, to recover on an account for goods furnished, and labor performed, a balance claimed to be due of \$66.90. Immediately upon being summoned the plaintiff in error offered to confess a judgment for the sum of \$40, together with the costs then accrued, as provided in sect. 1004 of the Code of Civil Procedure, by which it is enacted that, "If the defendant at any time before trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with

the costs then accrued. But if he do not accept such offer before the trial, and fail to recover in the action a sum equal to the offer, he cannot recover costs accrued after the offer, but costs must be adjudged against him. But the offer and failure to accept it cannot be given in evidence to affect the recovery, otherwise than as to costs, as above provided." The recovery being less than this offer, the defendant in error had judgment in his favor for the amount of the verdict and costs before the filing of the offer, but against him for all costs made subsequently to that time.

From this judgment the defendant in error appealed to the District Court, where the verdict in his favor was for a still smaller amount. Whereupon, on the 2d day of April 1878, he filed a motion for judgment on the verdict, and for his costs, notwithstanding the said offer to confess, and at the same time proved to the court the fact, then for the first time brought to its attention, that he was still a minor, and would not attain his majority until the 6th day of September of that year. On the 7th of October, while this motion was still pending, and before any further step had been taken in the case, the defendant in error, by special appearance, disclaimed all right to the verdict, or benefit under it, and insisted on "his minority as a bar to any judgment against him for any costs in this case." Acting upon this disclaimer, and the unquestioned minority of the defendant in error as stated, the court dismissed the case generally, and, against the demand of the plaintiff in error, refused to enter judgment in his favor for his costs. This refusal is the ground of the alleged error, and to correct which the case is brought to this court.

The first question to be disposed of is one of practice, raised by defendant in error in his brief. He contends that in order to make an offer to confess judgment under the statute available to the party making it on appeal, the offer must be renewed in the Appellate Court. We cannot so hold. The offer once properly entered, becomes a part of the record of the case, and if not withdrawn, is just as available on final judgment in the Appellate Court as it could have been in the court where made, had no appeal been taken.

The next, and main question presented by the record is much more difficult, and altogether novel in this court. By our legislation all the disabilities of infants, as they exist at common law, are fully recognised. Indeed we are not aware of any statute in this

state modifying them in any respect whatever. Accordingly, we find that section thirty-six, of the Code of Civil Procedure, provides that: "The action of an infant must be brought by his guardian or next friend." And even when brought by his next friend, if it be discovered that the action is not for the infant's benefit, the court, on its own motion, may dismiss it. Our practice in this respect seems to be based upon the unquestionable presumption of law that, until a person arrives at full age, no matter what his mental attainments and experience in life may be, he has not sufficient capacity to decide for himself whether the action would probably benefit him, or whether under all the circumstances it ought to be brought. Observing still further the common law respecting suits by infants, our code, section thirty-seven, provides that: "The guardian or next friend is liable for the costs of the action brought by him." Thus implying very clearly that even although the infant has had the benefit of the judgment of a person of mature years as to the propriety of bringing the action, yet if it result disastrously to him, he shall not be liable to a judgment for the costs. Indeed, one of the chief objects in requiring a next friend seems to be, as was said in *Heft et al. v. McGill et al.*, 3 Penn. St. 256, "to supply the want of capacity in the infant, to afford in his own person a party on the record responsible for costs." And we find that independently of statutory regulation, the rule seems to be that no judgment for costs can be rendered against an infant plaintiff: *Bowche v. Ryan*, 3 Blackf. 472; *Sproule v. Botts*, 5 J. J. Marsh. 162. But in Massachusetts, under a peculiar statute, it is held that an infant plaintiff, and not his *prochein ami*, is liable to judgment for costs. In one case, WILDE, J., remarked: "The defendants claim costs against the *prochein ami*, on the ground that the plaintiff being an infant is not liable therefor; and this claim seems to be supported by the English practice. But our practice seems to be different, and is conformable to our statutes regulating the recovery of costs." In that state, in order to make the *prochein ami* liable for costs, he must endorse the writ therefor: *Smith v. Floyd*, 1 Pick. 275; *Crandall v. Claid and Wife*, 11 Metc. 288. We have no statute similar to that of Massachusetts, but, as before shown, our legislation harmonized completely with the practice under the common law, both in England and in this country.

Now it would seem to be a reasonable conclusion from what we have already shown, that had judgment been rendered against the defendant in error while he was still a minor, it would have been erroneous. If an infant plaintiff who has had the advice of a guardian or next friend, as to the propriety of commencing his action, cannot be required to pay costs when defeated, upon what principle can he be adjudged to pay them when he has been so indiscrete as to proceed without such aid, relying alone upon his own immature judgment in the matter? We know of none.

It may seem a hardship on the plaintiff in error, to be put to the expense of defending against what was proven to be an unjust demand without recourse finally against the claimant. But this result he could have successfully guarded against by pleading the infancy of the plaintiff in the action in abatement at the outset, by which he would either have brought into the case a responsible "next friend," who would have been liable for costs, or obtained a dismissal of the action without further trouble or expense. It only remains now to inquire whether by reason of the defendant in error having arrived at his majority, before the termination of the action, a judgment against him for costs would have been proper.

From analogy to the cases of the ratification of the voidable acts of infants after becoming of full age, we think it clear that if, after reaching his majority, he had either assented to judgment on the verdict, or taken a single step in the further prosecution of the action, all the privileges of infancy would thereby have been fully waived, and he would have been bound by the action of the court. But the record shows that, at the very first opportunity after he reached the age of twenty-one years, he disclaimed all benefit from what had been done in the case, and in the most unequivocal manner denied the jurisdiction of the court to proceed further. Our opinion is that a judgment against the defendant in error, under these circumstances, would be equally as erroneous as if it had rendered while he was yet an infant.

Judgment affirmed.

ABSTRACTS OF RECENT DECISIONS

SUPREME COURT OF THE UNITED STATES.¹SUPREME COURT OF ERRORS OF CONNECTICUT.²COURT OF APPEALS OF MARYLAND.³SUPREME COURT OF MICHIGAN.⁴SUPREME COURT OF MISSOURI.⁵SUPREME COURT OF OHIO.⁶

• ACCOUNT.

Attachment of Balance due.—Arbitration.—In an action for an account and the recovery of money, where the defendant admits his indebtedness to the plaintiff in a certain sum, but sets up that a judgment-creditor of the plaintiff has a suit in aid of execution then pending against the plaintiff and defendant, in which such indebtedness is sought to be subjected to the payment of his judgment: *Held*, that it is error to render judgment for the amount so admitted to be due, until such judgment-creditor is made a party, or his right in the premises is determined: *Benson's Adm. v. Stein*, 34 Ohio St.

But where a judgment is so erroneously rendered, the error is cured whenever it is made to appear of record in the case that such action in aid of execution has been dismissed by the party: *Id.*

Where, in an action to compel the statement of an unsettled account between the joint owners of a steamboat, with a prayer for a judgment for the amount that may be found due to the plaintiff, the defendant answers that the amount due the plaintiff has been ascertained and fixed by an award upon submission to a third person, and the plaintiff replies, admitting the submission and award, and asks judgment thereon, there is no such departure in pleading as will vitiate a judgment for the amount admitted to be due by the answer. The judgment in such case rests on the petition and answer, and not on the reply: *Id.*

ACTION.

Suit to recover back Compulsory Payments.—Payment made under stress of a legal process is compulsory, and if unlawfully exacted, the person making it can sue to recover it back: *People ex rel. Gebhart v. East Saginaw*, 40 Mich.

Mandamus to compel payment to a contractor from a special assessment, was denied where the assessment had been adjudged invalid in a suit brought by a tax-payer to recover back what he had paid: *Id.*

ASSIGNMENT. See *Debtor and Creditor*.

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1878. The cases will probably be reported in 7 or 8 Otto.

² From John Hooker, Esq., Reporter; to appear in 45 Conn. Reports.

³ From J. Shaaf Stockett, Esq., Reporter; to appear in 48 Md. Reports.

⁴ From H. A. Chaney, Esq., Reporter; to appear in 40 Michigan Reports.

⁵ From T. K. Skinker, Esq., Reporter; to appear in 68 Mo. Reports.

⁶ From E. L. DeWitt, Esq., Reporter; to appear in 34 Ohio State Reports.

BILLS AND NOTES. See *Set-off*.

CONSTITUTIONAL LAW. See *Taxation*.

Corporations—Impairing Obligation of Contracts—Statute.—By the statutory code of Georgia, which came in force January 1st 1863, it was enacted that private corporations were subject to be changed, modified or destroyed at the will of the creator, except so far as the law forbids it, and that in all cases of private charters thereafter granted, the state reserved the right to withdraw the franchise, unless such right is expressly negated in the charter. Two railroad corporations created prior to 1863, each of which enjoyed by its charter a limited exemption from taxation, were consolidated by virtue of an act of the legislature, passed on the 18th of April 1863, which authorized a consolidation of their stocks, conferred upon the consolidated companies full corporate powers, and continued to it the franchises, privileges and immunities which the companies held by their original charters: *Held*, 1. That by the consolidation a new corporation was created, and the original companies were dissolved. 2. That the new corporation became subject to the provision of the code which reserved the right of the legislature to withdraw its charter, or to change, modify or destroy it. 3. That a subsequent legislative act taxing the property of the corporation as other property in the state is taxed, was not prohibited by that provision of the Constitution of the United States which denies to a state the power of passing a law impairing the obligation of contracts: *Atlantic and Gulf Railroad Co. v. State of Georgia*, S. C. U. S. Oct. Term 1878.

The judgment of the highest court of a state, that a statute has been enacted in accordance with the requirements of the state constitution, is conclusive upon this court, and it will not be reviewed: *Id.*

CONTEMPT.

Habeas Corpus.—The regularity of a committal for contempt in refusing to pay alimony will not be reviewed on an application for the writ of habeas corpus, if it was regular on its face: *In re Bissell*, 40 Mich.

COPYRIGHT.

What constitutes an Infringement.—The complainants were owners of a copyright of a series of maps of the city of New York, prepared for the use of those engaged in the business of fire insurance, the title of which was as follows: "Maps of the city of New York, surveyed under the direction of insurance companies of said city, by William Perris, civil engineer and surveyor, 1852. Volume 1, comprising the 1st, 2d, 3d and 4th wards." The maps exhibit each lot and building, and the classes as shown by the different coloring and characters set forth in the reference. The maps were made after a careful survey and examination of the lots and buildings in the enumerated wards of the city, and were so marked with arbitrary coloring and signs, explained by a reference, or key, that an insurer could see at a glance what were the general characteristics of the different buildings within the territory delineated, and many other details of construction and occupancy necessary for his information when taking risks. The defendant made the necessary examination and survey, and published a similar series of maps for Philadelphia. At first he used substantially the same system of coloring, signs and key, but afterwards changed his signs somewhat, and his key: *Held*, that the

publication of the defendant did not infringe the copyright of the complainants: *Perris v. Hexamer*, S. C. U. S., Oct. Term 1878.

A simple copyright of a map does not give a publisher an exclusive right to the use upon other maps of the particular signs and key which he saw fit to adopt for the purpose of his delineations: *Id.*

CORPORATION. See *Constitutional Law*; *Municipal Corporation*.

Charter—Validity not impeachable collaterally—Estoppel—Res Adjudicata.—The validity of the articles of incorporation of an association cannot be inquired into incidentally and collaterally: *Keene v. Van Reuth*, 48 Md.

A party to proceedings in equity under which the title to property has been acquired, is estopped from disputing the title so acquired: *Id.*

Consolidation of—Rights of New Corporation—Equity.—A general law of the state of New York authorized any railroad companies having continuous lines to unite and form a single corporation. Two railroad companies owning roads, one of which was wholly within that state and the other partly within that state and partly within the state of Connecticut, made an agreement to consolidate, and took all the formal measures required to accomplish it, but a question was made as to the validity of the consolidation by reason of the roads not having at the time a completed continuous track. A resolution of the legislature of Connecticut had provided that, whenever a company owning the road lying partly within this state should be consolidated with any other company in the state of New York, in pursuance of the laws of that state, the new company should have all the rights within this state that were possessed by the old: *Hell*, 1. That an act subsequently passed by the legislature of New York recognising the consolidated corporation as in existence, validated and established the agreement under which the consolidation was made. 2. That when the legal existence of the new corporation in the state of New York became thus established, it satisfied the requirements of the Connecticut act, and the new company became possessed of all the rights in this state which had been possessed by the old company: *Mead v. N. Y., Housatonic & Northern Railroad Co.*, 45 Conn.

The new corporation succeeded to the power possessed by the old company, both in this state and in the state of New York, to issue its bonds to an amount necessary for completing its road, and to mortgage its property and franchise for their security: *Id.*

And this power included the power to issue its bonds in exchange for, and to take up, bonds previously issued by the old company and secured by a mortgage of its property: *Id.*

A bill in equity alleged that the new corporation duly issued its bonds and disposed of a large number of them to divers persons, who were *bona fide* holders of the same and entitled to receive the money due thereon and to the benefit of the mortgage: *Hell*, to be a sufficient averment that the bonds were lawfully issued and used: *Id.*

After the bonds were issued and the mortgage executed, and while both were outstanding unsatisfied, but before the mortgage had been recorded, a creditor of the company, with knowledge of all the facts, attached and afterwards levied his execution upon the mortgaged property: *Hell*, that he stood no better than if, with such knowledge, he had taken a conveyance of the property, and that he did not obtain priority of title: *Id.*

A court of chancery in this state has jurisdiction of a bill for the foreclosure of such a mortgage, although embracing property out of this state as well as within it: *Id.*

It is a well-established principle that a court of chancery, acting primarily *in personam* and not merely *in rem*, may, where a person against whom relief is sought is within the jurisdiction, make a decree, upon the ground of a contract or an equity subsisting between the parties, respecting property situated out of the jurisdiction: *Id.*

COUNTY. See *Municipal Bonds*.

CRIMINAL LAW. See *Limitations, Statute of*.

Absence of Prisoner.—It is no ground for the reversal of a judgment, that a motion for a new trial was made, argued and overruled in the absence of the prisoner, where no objection was made till after sentence: *Griffin v. The State*, 34 Ohio St.

Absence of Prisoner during Trial—Evidence—Reputation.—The fact that the prosecuting attorney began his closing argument to the jury while the defendant was temporarily absent from the court room, will not warrant the reversal of a judgment of conviction, in the absence of evidence that the defendant was prejudiced thereby, or that any substantial portion of the argument was made before his return: *State v. Grate*, 68 Mo.

A witness who is well acquainted with a person whose character is in question, and lives in his neighborhood, will be allowed to testify to his general reputation, although he may never have heard it discussed or questioned. Frequently the highest evidence which can be offered of character is of this negative kind: *Id.*

Evidence—Bigamy—Mormonism.—If a witness is kept away by the adverse party, his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence: *Reynolds v. United States*, S. C. U. S., Oct. Term 1878.

In an indictment for bigamy, it is no defence that the accused was a member of the Church of Jesus Christ of Latter Day Saints, commonly called the Mormon Church, and that he married the second time because he believed it to be his religious duty: *Id.*

Murder—Evidence.—On an indictment for murder the prisoner's counsel offered to prove by the widow of the murdered man that her husband was jealous of her, and had accused her of being too intimate with other men than the prisoner, and stated to the court at the time of the offer that he proposed to follow up this proof by evidence tending to prove that the killing for which the prisoner was indicted grew out of a quarrel between the prisoner and the deceased, occasioned by the deceased having charged the prisoner with being too intimate with the wife of the deceased: *Held*, that the proof offered, whether considered by itself or in connection with the evidence with which it was proposed to follow it up, was inadmissible: *Costley v. State*, 48 Md.

The general reputation in the neighborhood that the deceased was jealous of his wife, could not possibly furnish any explanation of the circumstances under which his life was taken, and was therefore not admissible in evidence: *Id.*

Personation of Juror.—Where, in a capital case, a person not summoned as a juror personates one who was returned on the venire, sits at the trial and joins in a verdict of guilty, the verdict will be set aside and a new trial granted, it appearing that neither the accused nor his counsel was guilty of laches: *McGill v. The State*, 34 Ohio St.

Verdict silent as to one of the Counts of the Indictment.—When an indictment, in distinct counts, charges a rape and an attempt to commit a rape upon the same person, referring to the same act, a verdict of guilty as to either count amounts to an acquittal of the crime charged in the other. The failure of the jury to make an express finding as to the latter, therefore, is not error requiring a reversal of the judgment: *State v. Cofer*, 68 Mo.

DEBTOR AND CREDITOR.

Assignment for Benefit of Creditors—Preference.—The right of a debtor at common law to devote his whole estate to the satisfaction of the claims of creditors results from that absolute ownership which every man claims over that which is his own: *Reed v. McIntyre*, S. C. U. S., Oct. Term 1878.

Assignments of property for such purposes, not made with the intent to hinder, delay or defraud creditors, were upheld at common law, even where certain creditors were preferred in the distribution of the debtor's effects: *Id.*

An assignment which had the effect to delay a creditor in the enforcement of his demand by the ordinary process of law, was not, for that reason alone, fraudulent and void. If not made with the intent to hinder, delay, or defraud creditors, it was sustained at common law: *Id.*

Good Faith—Sale Fraudulent as against Creditors.—A purchaser's good faith is not conclusively established by his uncontradicted testimony. The question is for the jury: *Molitor v. Robinson*, 40 Mich.

A sale made by a debtor and not accompanied by immediate delivery is only *prima facie* fraudulent as against his creditors, and not conclusively so: *Id.*

EASEMENT. See *Ejectment*.

EJECTMENT.

For Easements.—Ejectment does not lie to recover an incorporeal easement, such as the use of an alley: *Taylor v. Gladwin*, 40 Mich.

The recital of an incorporeal right in a judgment of ejectment is nugatory and does not affect its validity: *Id.*

EQUITY. See *Corporation*; *Specific Performance*.

Ignorance of Law.—Courts of equity may grant relief against acts and contracts executed under mistake or in ignorance of natural facts, but it is otherwise where a party wishes to avoid his act or deed on the ground that he was ignorant of the law: *Ignorantia legis non excusat*: *Andreae v. Redfield*, S. C. U. S., Oct. Term 1878.

Opening Decree to let in Defence.—Where a decree has been passed by default, without a hearing upon the merits, a court of equity has power, in the exercise of a sound discretion, to vacate the enrolment in order to let in a meritorious defence, and this may be done upon pe-

tion, without a bill of review or an original bill for fraud: *First National Bank v. Eccleston*, 48 Md.

This discretion extends as well to the time when the petition is to be filed as to the other circumstances creating a case: *Id.*

Will not relieve on a ground not stated in the Petition—Mistake.—Plaintiff being the beneficiary in a mortgage in which the land intended to be conveyed was not correctly described, brought his suit to have the mistake corrected. The holder of a later mortgage, covering the same land, was made co-defendant with the mortgagor, the petition alleging that he knew of the mistake when he took his mortgage; and this was the only ground on which the pleadings placed the plaintiff's claim to relief as against him. At the trial it appeared that the later mortgage was given as security for a pre-existing debt. Plaintiff had judgment. On appeal by the holder of the later mortgage, it was contended, on behalf of the plaintiff, that even if the appellant had no notice of the earlier mortgage, as charged, still the judgment was right, since, the later mortgage being given to secure a pre-existing debt, the appellant was not a purchaser for a valuable consideration: *Held*, that the judgment could not be sustained on this ground, no such case being made by the pleadings; and the court having, upon an examination of the evidence, come to the conclusion that the appellant had no notice of the mistake, reversed the judgment: *Cox v. Esteb*, 68 Mo.

ESTOPPEL. See *Corporation*.

EVIDENCE. See *Criminal Law*.

Impeaching Party's own Witness.—The defendant after having introduced the testimony of Jonathan Brock, his own witness, taken under a commission issued by consent, offered Brock's previous letter to the defendant, for the purpose of impeaching his credit: *Held*, that when Brock was testifying under the commission, as the defendant's witness, the opportunity was afforded the defendant of confronting him with his letter, but failing to do so, he could not offer his letter at the trial for the purpose of impeaching his credit: *Sewell v. Gardner*, 48 Md.

Where a witness gives evidence against the party calling him, who was misled by the prior statements of the witness, the party is not bound by whatever the witness may say, but he is permitted to call other witnesses not to impeach him, but to contradict him as to a fact material to the issue, in order to show how the fact really is: *Id.*

Party as Witness after death of other Party—Husband and Wife.—A widow having testified on her own offer and in her own behalf that her signature and acknowledgment to a certain deed executed by her and her former husband, were obtained from her by duress and fraud on his part, it was objected that she was not a competent witness, after the death of her husband, to testify that her signature to the deed was procured by his fraud and violence: *Held*, that the witness was competent; that such evidence was not excluded by the provision in the Evidence Act that "when an original party to a contract or cause of action is dead, either party may be called as a witness by his opponent, but shall not be admitted to testify on his own offer:" *First National Bank v. Eccleston*, 48 Md.

FORMER ADJUDICATION. See *Mandamus*.

FRAUD. See *Debtor and Creditor; Specific Performance.*

HABEAS CORPUS. See *Contempt.*

HOMESTEAD.

Widow's Homestead—Dower.—A widow entitled to both homestead and dower in land of her deceased husband, caused her dower to be assigned, and accepted the assignment, but, being ignorant of her right to a homestead, did not then claim it. Being administratrix of her husband's estate, she also procured from the probate court an order for the sale of all the lands of the estate, but no sale was ever made. In a proceeding subsequently instituted by her to have her homestead set out: *Held*, that her acts did not constitute either a waiver or an estoppel so as to prevent her from asserting her right: *Seek v. Haynes*, 68 Mo.

INJUNCTION. See *Mandamus.*

INSURANCE.

Paid-up Policy—Non-forfeiture.—In a life insurance policy the payment of premiums was to cease after ten years. The policy contained a provision that, after two or more of the annual premiums had been fully paid, the policy might be exchanged for a paid-up non-forfeiture policy, for an amount equal to the sum of one-tenth of the amount insured for each premium which had been so paid. A condition of the policy was that, if the amount of any annual premium should not be fully paid on the day and in the manner provided for, the policy should be "null and void and wholly forfeited," and that in case the policy became null and void, all payments which had been made thereon should be forfeited to the company: *Held*, that the right of the assured to exchange the policy for a paid-up non-forfeiture policy was limited to the time during which the policy was in force: *Bussing's Executors v. Union Mutual Life Ins. Co.*, 34 Ohio St.

Stock Notes—Statute of Limitations.—The subscribers to the stock of an insurance company organized under a special charter granted prior to the adoption of the present constitution, gave to the corporation their secured promissory notes, payable on demand, for the amount of the stock by them respectively subscribed: *Held*, that the notes must be construed in connection with the nature of the business of the corporation, and in view of the object intended by the parties in giving their notes. Thus construed, the notes were intended to be payable on the call of the directors; and the Statute of Limitations is no more available as a defence against the collection of the notes, than it would have been against the collection of the subscriptions: *Kilbreath v. Gaylord*, 34 Ohio St.

INTOXICATING LIQUORS.

Damages caused in part by Sale of—Sunday.—The provision of the act of 1870, which creates a liability on the part of the seller for an injury resulting from intoxication, to which the liquor unlawfully sold or furnished by him contributes only *in part*, is not in conflict with the constitution: *Sibila v. Buhney*, 34 Ohio St.

In an action brought by a married woman, under said amended section, for an injury to her means of support in consequence of the intoxication
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of her husband, it is not error for the court to refuse to charge that "if the jury award the plaintiff any amount by way of exemplary damages, they should not consider the fact, if such they find it to be, that certain of the illegal sales were made on Sunday;" *Id.*

JOINT DEBTOR. See *Limitations, Statute of.*

LAND DAMAGES. See *Municipal Corporations.*

LANDLORD AND TENANT.

Grant of Reversion—Mortgage.—It is a well-settled principle of the common law that the grant of the reversion or an estate expectant on the determination of a lease for years, passes to the grantee the rents reserved in the lease as incident to the reversion: *King v. Housatonic Railroad Co.*, 45 Conn.

Since the statute of Anne, notice of the grant to the tenant has been sufficient in the English courts to entitle the grantee to demand and recover the rents. And that rule has been adopted by the courts of this state, and by those of many of our sister states: *Id.*

Where the grant of the reversion is by way of mortgage, the mortgagee, though entitled to the rents as incident to the reversion, may take them or not at his election. If he allows the mortgagor to receive them, and afterwards elects to take them himself, and gives notice of his election to the tenant, he becomes entitled to all the rents accruing after the execution of the mortgage and in arrear and unpaid at the time of the notice, as well as to those which accrue afterwards. But the rents in arrear at the time the mortgage was executed belong to the mortgagor: *Id.*

LIMITATIONS, STATUTE OF. See *Insurance.*

Concealment of cause of Action.—It is no answer to a plea of the Statute of Limitations that the cause of action was fraudulently concealed by the defendant until after the statute had attached, and that the suit was brought within the time limited by the statute after the discovery of the right to sue: *Andreue v. Redfield*, S. C. U. S., Oct. Term 1878.

Criminal withholding of Pension Money.—Whenever the act or series of acts necessary to constitute a criminal withholding by an agent of pension money have transpired, the crime is complete, and from that day the Statute of Limitations begins to run against the prosecution: *United States v. Irvine*, S. C. U. S., Oct. Term 1878.

Joint Promissors.—One joint maker of a note shall not lose the benefit of the Statute of Limitations by reason of payments made by another: *Rogers v. Anderson*, 40 Mich.

Unexplained endorsements and endorsements written by or for the payee are not sufficient proof to take a case out of the Statute of Limitations: *Id.*

The admissions of one joint maker are not evidence against another: *Id.*

Running when once commenced is not suspended by subsequent disability—A cause of action having accrued and the Statute of Limitations having commenced to run during the lifetime of the deviser of the plaintiff: *Held*, that the running of the statute was not interrupted by his subsequent decease and the descent of the right of action to the

plaintiffs, though minors at the time and under disability to sue: *Harris et al. v. McGovern et al.*, S. C. U. S., Oct. Term 1878.

When the statute once begins to run, it will continue to run without being impeded by any subsequent disability: *Id.*

United States not barred.—A state statute cannot bar the United States: *United States v. Thompson et al.*, S. C. U. S., Oct. Term 1878.

MANDAMUS. See *Action*.

Injunction to restrain Action at Law.—Mandamus will not lie to compel a court to proceed with a trial that has been enjoined: *People ex rel. Ives v. Circuit Judge for Muskegon Co.*, 40 Mich.

The sufficiency of an injunction bill cannot be reviewed in collateral proceedings: *Id.*

MORTGAGE. See *Landlord and Tenant*.

Foreclosure.—A mortgage may be foreclosed for interest overdue on the mortgage note, where the principal of the note is not yet due: *Butler v. Blackman*, 45 Conn.

Priority of Mortgage for Purchase-money.—A mortgage given to a vendor to secure an unpaid balance of purchase-money of land and recorded on the same day, has priority of one which is given by the vendee, before he has concluded the purchase, to a person who furnishes him the money to make the cash payments, notwithstanding the latter is recorded first: *Turk v. Funk*, 68 Mo.

MUNICIPAL BONDS.

County Bond Tax—Limitation of the Rate, part of the Contract.—One who takes county bonds issued under a statute which limits the rate of taxation that may be imposed for their payment to one-twentieth of one per cent., is chargeable with knowledge of the limitation. It enters into and forms part of the contract between him and the county; and the county court cannot be compelled, by mandamus, to appropriate other funds in the county treasury, raised for other purposes, to the payment of such bonds. Neither the fact that they have been reduced to judgment, nor the fact that the specific fund provided is inadequate, can change this rule: *State v. Macon County Court*, 68 Mo.

The extraordinary indebtedness incurred by a county in issuing bonds to pay a railroad subscription, is not one of the "expenses of the county" within the meaning of Wag Stat., sect. 166, 1193, and cannot be paid out of the fund raised by taxation under that section: *Id.*

The county court will not be compelled, by mandamus, to issue a warrant on the common fund of the county for the payment of railroad bonded indebtedness, when the result would be to withdraw from the treasury all the funds necessary for the support of the county government, and thus to disrupt and disorganize it: *Id.*

When the county court has refused the application of a creditor of the county, whose claim has been reduced to judgment, for a warrant on the treasury payable out of a particular fund, it will not be compelled, by mandamus, to change its decision and grant the warrant; 1st. Because its action on the application is judicial; 2d. Because an appeal lies from its order to the Circuit Court: *Id.*

The case of the *United States ex rel. v. Clark County Court*, 96 U. S. Rep. 211, disapproved.

MUNICIPAL CORPORATION. See *Action*.

Cannot delegate its Legislative Powers—Wharves.—It is well settled that the legislative powers of a municipal corporation cannot be delegated. They are in the nature of public trusts conferred upon the legislative assembly of the corporation for the public benefit, and cannot be vicariously exercised. Hence, a city authorized by its charter to erect, repair and regulate public wharves, and to fix the rate of wharfage thereat, cannot lease its wharf, or farm out its revenues, or empower any one else to fix the rates of wharfage; and a contract whereby the city undertakes to do these things is void: *Matthews v. City of Alexandria*, 68 Mo.

Damage by grading Street.—The owner of a lot abutting on an unimproved street of a city or village, in erecting buildings thereon, assumes the risk of all damage which may result from the subsequent grading and improvement of the street by the municipal authorities, if made within the reasonable exercise of their power: *City of Akron v. Chamberlain Co.*, 34 Ohio St.

The liability of a municipality for injury to buildings on abutting lots exists only where such buildings were erected with reference to a grade actually established, either by ordinance or such improvement of the street as fairly indicated that the grade was permanently fixed, and the damage resulted from a change of such grade, or, where the buildings, if erected before a grade was so established, were injured by the subsequent establishment of an unreasonable grade: *Id.*

Whether a grade be unreasonable or not, must be determined by the circumstances existing at the time the grade was established and not by the circumstances existing at the time the abutting lots may have been improved: *Id.*

Within the principle of municipal liability, as above stated, is the case where a lot is improved in anticipation of, and with reference to, a reasonable future grade which is afterward established, and damage results from a subsequent change in the grade: *Id.*

Paramount right over its Streets for the purpose of constructing Sewers—The use of a Street for Railway purposes subject to such paramount right.—On a bill for an injunction to restrain the appellants from removing the railway tracks of the appellee on a portion of Carey street, in the city of Baltimore, the object of such removal being to construct a sewer under the bed of said street, in pursuance of a contract made by the appellants with the city authorities, it was *Held*, That in the exercise of the power to construct sewers they had the right not only to obstruct, but to discontinue entirely the use of Carey street as a highway, so long as it might be necessary for the purpose of constructing a sewer under the bed of the street: *Kirby v. Citizens' Railway Co.*, 48 Md.

Held further, That the easement of appellee was subject to this paramount right, and in constructing its railway the appellee knew, or was bound to know, that its use of the bed of the street for railway purposes, was liable at any time to be interfered with, whenever the city authorities might deem it necessary for the public welfare: *Id.*

The power being lawful in itself, it could only become unlawful in consequence of the mode in which it was carried into execution. It was apparent from the bill in this case that the sewer could not be constructed without interfering with the railway track, and whatever injury might result therefrom must be regarded in law as "*damnum absque injuria*." *Id.*

NATIONAL BANK.

Competency to hold Real Estate—Mortgage.—Every loan or discount by a bank is made in good faith, in reliance, by way of security, upon the real or personal property of the obligors, and unless the title by mortgage or conveyance is taken to the bank directly, for its use, the case is not within the prohibition of the statute. The fact that the title or security may inure indirectly to the security and benefit of the bank will not vitiate the transaction: *Union National Bank et al. v. Matthews*, S. C. U. S., Oct. Term 1878.

Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose: *Id.*

NEW TRIAL.

In Criminal Case.—Upon a petition for a new trial for newly-discovered evidence, after a conviction for a rape, it was *Held*, 1. That the fact of the evidence of the newly-discovered evidence could not be proved by mere *ex parte* affidavits. 2. That new evidence was not sufficient that merely went to show that the principal witness had before the trial made a statement inconsistent with that made on the trial. 3. Nor that which showed that the witness (the victim of the rape), had altered her opinion as to the petitioner being the person who committed the crime, where the change of opinion originated in a suggestion by another and was arrived at by a process of reasoning: *Shields v. The State*, 45 Conn.

It is a general rule that a new trial will not be granted upon the mere after-recollection of a former witness: *Id.*

Motion not reviewable on Appeal.—The motion for a new trial being addressed to the discretion of the court, its action thereon cannot be reviewed on appeal: *Zitzer v. Jones*, 48 Md.

PARTNERSHIP.

Partnership promise to pay a Third Person's Debt—Accommodation Endorsements—Declarations and Admissions of Partners.—A partner is not bound by an accommodation endorsement made in the name of his firm, but without his assent: *Heffron v. Hanaford*, 40 Mich.

A partner's declarations cannot bind his associates in concerns foreign to the partnership, nor can his admissions bring such matters within the scope of the business: *Id.*

A note was given by a debtor to an execution-creditor to obtain a release from a levy, and was endorsed in the name of a firm by one of the partners. There was no showing that the firm received any consideration, or that one of the partners consented to the endorsement: *Held*, that it must be presumed that it was purely an accommodation endorse-

ment, and that the creditor, who of course was not a *bona fide* holder, was privy to all the facts: *Id.*

Where the authority of a partner to speak for his associates is not shown, his statements, so far as concerns them, are mere hearsay: *Id.*

PAYMENT. See *Action*.

RAILROAD. See *Municipal Corporations*; *Taxation*.

REMOVAL OF CAUSES.

After New Trial Granted.—A cause can be removed from a state court to the Circuit Court after a trial and judgment in the state court if before the removal the first judgment has been set aside or vacated, and the right to a new trial perfected: *Chicago and Northwestern Railway Co. v. McKinley*, S. C. U. S., Oct. Term 1878.

SET-OFF.

Joint and separate Debts.—The general rule in equity, as at law, is, that joint debts can not be set off against separate debts, unless there be some special equity justifying it: *Second National Bank v. Hemingray*, 34 Ohio St.

If there are such equities, the bankruptcy of the party against whom they exist, is sufficient ground for the allowance of the set-off against notes not due at the time of the assignment.

Where a banker induced a firm to continue its deposit account with him, by deceptively holding himself out as being still the holder of several negotiable notes made to him by the principal member of the firm, when in fact he had assigned them as collateral security for a debt, and there was an understanding between the firm and the banker, from the course of dealing between them, that the notes of the individual members were to be paid through the deposit account of the firm, and which he had a right to treat as his own for that and other purposes; on the bankruptcy of the banker, *Held*, That after satisfying the debt for which the notes of the individual member were held as security, the latter, as against the assignees of the bankrupt, is in equity entitled to set off the firm account against the balance due on the notes; *Id.*

In an action on a negotiable note which the plaintiff holds by assignment before due, in consideration of, and as collateral security for a loan made by him to the insolvent payee, against whom the maker is entitled to an equitable set-off to the note, the plaintiff will be limited in his recovery against the maker to the amount of the debt which the note secures, and will not, in addition thereto, be allowed the amount of his attorney's fees in prosecuting the action: *Id.*

SLANDER.

Action by Husband and Wife for charging the Wife with Adultery—Words actionable per se—What is not special Damage.—In suits for slander, pecuniary loss to the plaintiff is the *gist* of the action, and courts at an early day recognised a distinction between words *actionable*, and words *not actionable in themselves*. In the former, the law *presumes* pecuniary loss, whilst in the latter it is necessary to prove special damage to the plaintiff: *Shafer v. Ahalt*, 48 Md.

When one charges another with the commission of an offence, it must be such an offence as subjects the party to *corporal punishment*, in order to render the words actionable *per se*: *Id.*

The crime of adultery is not so punishable, and hence to charge one with adultery is not actionable *per se*, and the plaintiff must prove special damage: *Id.*

Special damage in such cases is that which is naturally the consequence of the words spoken, and not such as is occasional and accidental. Sickness of the person slandered, resulting from the slanderous charge, is not sufficient to prove special damage: *Id.*

SPECIFIC PERFORMANCE.

Mistake and Fraudulent Representation as Defences.—Where the facts would preclude an original contracting party from claiming specific performance because it would operate as a fraud on the defendant, no person claiming through him can assert a better right without showing that he is a *bona fide* purchaser: *Berry v. Whitney*, 40 Mich.

Mistake may be shown by parol as a defence to the specific performance of a written instrument: *Id.*

Fraudulent representations as to the legal effect of an instrument will avoid it, even if made to one who has actually read it, if unable to judge of its true construction. But the fraud must be contemporaneous with the execution of the instrument and must consist in obtaining the assent of the party defrauded, by inducing a false impression as to its legal or literal nature and operation: *Id.*

A mortgagor gave a warranty deed of the land, subject to the mortgage. A woman acting through her husband bought it from his grantee. The mortgage was foreclosed and the mortgagor bid in the land. The woman filed a bill to remove the cloud from her title and to compel the mortgagor to convey to her the interest he received by the foreclosure sale. The court found that she was not a *bona fide* purchaser without notice that the land was sold subject to the mortgage, and held that it would be unjust to compel a conveyance without payment of the mortgage, and dismissed the bill with costs: *Id.*

STATUTE. See *Constitutional Law*.

STREET. See *Municipal Corporation*.

SURETY.

Good Faith towards.—If a principal, having knowledge, or a belief founded on reasonable and reliable information, that his agent is a defaulter, requires sureties for his fidelity in the future, and holds him out as a trustworthy person, whereby such security is obtained, he cannot afterwards avail himself of a guaranty so obtained from a person who was ignorant of what was known to, and ought to have been disclosed by, the employer: *Dinsmore v. Sidball*, 34 Ohio St.

TAXATION.

Exemption from—Constitutional Law.—The act incorporating the Baltimore and Ohio Railroad Company, provides "that the said road or roads with all their works, improvements and profits, and all the machinery of transportation used on said road, are hereby vested in the said company, incorporated by this act, and their successors for ever; and

the shares of the capital stock of the said company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burden." Neither the act of incorporation nor the constitution of the state then in force, contained any provision reserving to the legislature the right to repeal or amend the charter of the company. *Held*: 1. That the exemption from taxation granted in the charter of the company, was a contract between the state and the corporators, within the protection of the Constitution of the United States, and therefore beyond the power of a subsequent legislature to repeal or in any manner impair. 2. That under the foregoing section of the act incorporating the Baltimore and Ohio Railroad Company, the property and franchises of the company were exempt from taxation; and the franchises being exempt, the gross receipts derived from the exercise of such franchises were also exempt: *State v. B. & O. Railroad Co.*, 48 Md.

The gross receipts of the entire road of the defendant from Baltimore to the Ohio river, and the gross receipts derived from the lateral roads built by the defendant, and from all buildings and works necessary and expedient to the operation of its road, were exempt from the imposition of any tax or burthen; and this too whether said road or roads and buildings and works were constructed with money derived from the subscription to its capital stock, or from sales of its shares of stock, or from money borrowed and secured by mortgage, or from the undistributed profits of the company, or from all these sources combined: *Id.*

The buildings and works necessary and expedient to the operation of the road within the meaning of the defendant's charter, were such buildings and works as were reasonably convenient and appropriate to the maintenance and operation of the road: *Id.*

The elevators, wharves, piers and docks owned by the defendant were necessary for its business as a common carrier for the purposes of receiving and storing grain and freight shipped over its road after the same had reached the place of destination, and previous to its delivery to the consignee or owner; but as such common carrier it had no right to own and use these structures for the storage of grain and freight after the owner or consignee had had a reasonable time to remove the same: *Id.*

While the defendant was not authorized by its charter to build and conduct hotels for the accommodation of the public generally, hotels or buildings for the accommodation of passengers over its road, were necessary to its business, and therefore within its charter: *Id.*

TRIAL.

Limiting number of Witnesses.—In an action for slander in charging the plaintiff with dishonesty, the defendant, for the purpose of lessening the damages, offered evidence of the plaintiff's bad reputation in that respect. The court limited him to ten witnesses. *Held*, to be a ground for granting a new trial: *Ward v. Dick*, 45 Conn.

UNITED STATES COURTS. See *Constitutional Law*.

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THE LAND LAW OF GREAT BRITAIN WITH ESPECIAL REFERENCE TO THE RIGHTS OF ALIENS.

THE English land law may not appear at first sight to present many attractions to an American reader, although the ancient tenures and the rules that formerly governed real estate continue to form an important subject in all legal studies. This, however, is rather as a matter of history than of practical utility to the American student, although many of the principles involved have survived exploded theories, and still, to some extent, govern existing institutions, even under an altered state of circumstances. But when in addition we consider the intimate relations existing between the two countries, cemented by upwards of sixty years of uninterrupted peace, and when further, it is remembered that within the last seven years, the English law excluding an alien from the inheritance and even the possession of land in that country has been relaxed even to the extent of placing all foreigners upon the same footing as natural-born British subjects, the question at once assumes a practical form and emerges from the shadowy region of previous inquiry into the real and substantial shape of interested investigation.

By the 2d section of stat. 33 & 34 Vict. c. 14, it is enacted that "real and personal property of every description may be taken, acquired, held and disposed of by an *alien*, in the same manner, in all respects, as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from or in succession to an *alien*, in the same manner, in all respects, as through, from or in succession to a natural-born British subject."

The only limitation to the full effect and operation of this section is, that it "shall not affect any estate or interest in real or personal estate to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the passing of this act, or in pursuance of any devolution by law on the death of any person dying before the passing of this act."

It will thus be seen that any American citizen may, without forfeiting his allegiance to his own country, and without the necessity of naturalization in Great Britain—nay, even without setting foot on British soil, find himself, perhaps unexpectedly, heir to a considerable estate in the latter country, and of which nothing but indifference to or ignorance of his rights, could interfere with the actual possession.

When we consider how many American citizens are removed by but two or three generations, perhaps only by one or even less, from the original family stock on the other side of the Atlantic, and that at any moment the hand of death may open a way to their succession, it is obvious that some acquaintance with the laws that regulate such rights is not only desirable, but, we might add, essential, at least to those who may be consulted under such a state of circumstances. It is believed therefore that a brief exposition may not be wholly devoid of interest, nor yet unacceptable to the profession at large.

I. And first: with respect to the English law of primogeniture, *pure and simple*. The law of PRIMOGENITURE, or the right of the eldest son to inherit to the entire exclusion of all his brothers and sisters, attaches, for the most part, to freehold property alone; or rather to lands held in free and common *socage*. It has no relation to leasehold property, that large and ever-increasing valuable accretion to real estate, and which passes according to the Statute of Distributions, which regulates the descent of personal property by much the same rules which affect all property in the United States.

In the case of copyhold or manorial lands, the law of descent, among the tenants of the manor, varies according to the customs of the respective manors. In some manors undoubtedly the law of primogeniture prevails. In others the land descends to the youngest son. In some to all the sons alike. And perhaps in a few instances the daughters inherit equally, to the exclusion of sons.

But yet the lordship of the manor descends according to the law of primogeniture, the lord being in theory a tenant *in capite* of the king, or holding direct from a tenant *in capite*, in which latter case he is termed a *mesne* lord and the manor a *mesne* manor, the word *mesne*, as is well known, signifying *middle*. It may here be mentioned incidentally that great facilities exist at the present day for converting copyhold property into freehold, the lord, of course, being properly compensated for the rights and privileges which he cedes.

It will be seen, therefore, that though the law of primogeniture prevails over the greater portion of the land of England, and, indeed, of the United Kingdom generally, it does not embrace the whole of it.

Leasehold property, which forms no portion of real estate, and is not, therefore, governed by its laws, though, as arising out of it, is termed "chattels real," passes like personal property to all the children equally, without regard to age or sex, although the freehold, out of which the leasehold is carved, descends, according to the law of primogeniture, with the exceptions before mentioned.

In the case of all kinds of property the absolute owner can dispose of the same by testamentary disposition, and thus, by a stroke of his pen, defeat the law of primogeniture, or any of the customary laws before alluded to. It is only in the absence of a will, or any other disposition *inter vivos* to the contrary, that an eldest son succeeds to the freehold, to the total exclusion of his brothers and sisters; in which case it may well be supposed that such was the wish of the former possessor; but such a case seldom occurs without some other provision having been made for younger children, or without the intestate leaving in addition personalty which would be distributed as before-mentioned. Such an event, therefore, forms not only no national grievance, but scarcely even a serious private one, which could not have been readily obviated by ordinary prudence and forethought by any one careful of the interests of his children.

II. As to dower. A widow is entitled to a life-interest to the extent of one-third in all freehold estate of which her husband dies possessed, unless such right of dower is barred, as is now usually done, with a view to the facility of transfer and conveyance.

In all cases where the marriage has taken place since the 1st of

January 1834, it is enacted, by statute 3 & 4 Wm. 4, c. 105, that dower may be barred either by the husband disposing of the land in his lifetime, or by will, or by a simple declaration in any deed executed by the husband, that all partial dispositions, debts, encumbrances, contracts and engagements to which his land shall be subject shall be good against his wife's dower; that it may be subjected to any restrictions by his will, and unless a contrary intention is declared by the will, a devise of any estate or interest in land, out of which the widow would be entitled to dower, to or for the benefit of the widow, shall bar her dower.

In cases where the marriage has taken place prior to the 1st of January 1834, the ancient modes of barring dower must have been resorted to in order to effect the object, viz.: By a jointure deed executed before marriage: 4 Rep. 1, 2. But if executed after marriage, the widow had her election to accept or refuse it, and betake herself to her dower at common law: 3 Myl. & Cr. 171; 1 Scott 82; Harg. Co. Litt. 36-7. But the usual mode upon purchasing an estate was to convey it to a trustee in bar of dower: the courts of equity refusing to acknowledge the right of dower as attaching to an equitable estate, dower being a right at common law only, and the legal estate being thus vested in the trustee. The celebrated Mr. Fearne contrived also a method by which the inheritance was limited to the husband during life, with a vested remainder in a trustee, in trust for the husband, to take effect in the event of the particular estate being terminated by forfeiture, or otherwise: 18 Viner 413; the husband, in the meantime, taking a life-interest only, but never having an estate of inheritance in possession during his life, so that the widow's title to dower could never exist: 3 Lev. 437. And further effect was given to this contrivance by investing the purchaser with power, under the Statute of Uses, of appointing the fee-simple in any manner he should please. Thus the wife's dower was effectually barred, or rather defeated: 5 B. & Ald. 561. As but forty-four years have elapsed since the passing of 3 & 4 Wm. 4, c. 105, it is still desirable and, indeed, essential to be acquainted with the old forms in use prior to that act, especially as sometimes the marriage of deceased persons can only be proved by repute, in the absence of a system of public registration which, prior to the date in question, did not exist in England. Thus the exact date of the marriage becomes unimportant. In Gavelkind, according to the custom of the county

of Kent, the wife's dower consists of a moiety: Wright's Tenures 118; Rob. Gavelk. 292.

In copyhold estate, the right to dower, or as it is termed, free-bench, depends upon the custom of the manor. In the absence of any special custom, the widow is entitled to free-bench out of *copyholds* only of which her husband died seised—her title being barred by her husband's simple alienation of the lands: Wood v. English, 5 Jurist 741; 2 Ves. Sr. 633; 1 Gale & Dav. 180.

No dower attaches to leasehold estate, the widow's share of such property being regulated, as before mentioned, by the Statute of Distributions, as forming part of the personal estate of a deceased intestate.

It will be seen from the foregoing that the facilities for barring dower in England amount almost to a destruction of that ancient right, and afford a marked contrast to the state of the law on that subject in the United States.

Although, as before mentioned, no dower attaches to leasehold estate, the widow is nevertheless entitled to one-third absolutely of the value of all personal property (including leasehold) not otherwise disposed of, if there is more than one child left by her deceased husband, whether of her or a prior marriage. If there is no child, or only one, she takes one-half of such undisposed property. Of course, the issue of a deceased child or children would inherit their parents' share.

III. Much misapprehension appears to prevail upon the subject of the English law of entail. It is generally assumed by the public that estates may be entailed in perpetuity, and this is perfectly true in theory, but the practice does not support the theory. There are perhaps not more than half a dozen estates throughout Great Britain held under a perpetual inalienable entail, and these are either such as have been granted by the nation to illustrious men, such as the Dukes of Marlborough and Wellington and their heirs, or such as from peculiar circumstances of tenure in support of and attached to hereditary dignities, have been thus specially entailed by express Acts of Parliament. For instance, the possession of the castle and demesne of Arundel, in the county of Surrey, confers by tenure the earldom of Arundel and Surrey, but yet such castle and demesne can be held only by the Dukes of Norfolk as Earls of Arundel and Surrey, under a special parliamentary entail.

Attempts to create perpetual entails, rendering lands inalienable,

were undoubtedly made at very early periods of English history, notably, by the statute *De donis conditionalibus* (Westminster II.), but the judges steadily set their faces against such encroachments, as being contrary to public policy, or rather, as public policy was understood in those times, against the interest of the king as lord paramount; and by resorting to a fiction of law, known as *levying a fine, and suffering a common recovery* (temp. Edw. 4), enabled the tenant in tail, under certain circumstances, to bar the entail and acquire the fee-simple. About two hundred years elapsed between the passing of the statute *De donis* and the application of common recoveries, although so early as the time of Edward 3, the courts had intimated an opinion that a bar might thus be effected. For this fiction of law is now substituted a simple disentailing deed. To give a brief illustration: A man, either by deed or will, settles his estate upon his son for life, and upon such son's first and other sons in tail, with various remainders over in the event of his son dying without male issue—in fact, creating a web of limitations both to heirs male and heirs female, with an ultimate remainder to his own right heirs, to provide against every contingency. The whole scheme so cleverly contrived, and the web so carefully woven, is, after all, little more than an ingenious specimen of the theory of conveyancing; for upon the tenant in tail coming of age, he can, under a modern statute, 3 & 4 Wm. 4, c. 105, s. 14, effectually bar the entail. The enacting clause of the statute is as follows: “Every actual tenant in tail, whether in *possession, remainder, contingency* or *otherwise*, shall have full power to dispose of, for an estate in fee-simple in possession, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which, but for some previous act, would have been vested in or might have been claimed by the person making the disposition at the time of his making the same; and also, against all persons (including his majesty, his heirs and successors) whose estates are to take effect *after the determination, or in defeasance* of any such estate tail; saving also the rights of all persons in respect of estates prior to the estate tail, in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made.”

And by ss. 8, 56 and 67, &c., creditors have the same benefit from the estate tail which a bankrupt could have had before his bank-

ruptcy under the 6 Geo. 4, c. 16, s. 65. The 3 & 4 Wm. 4, c. 105, is extended to Ireland by 4 & 5 Wm. 4, c. 92.

Of course, in addition, the tenant for life, by joining with the tenant in tail, may effectually surrender his life-interest, and the fee-simple of the estate with immediate possession may thus be brought into the market, the entail being for ever barred and all the remainders over scattered to the winds.

Prior to the passing of 3 & 4 Wm. 4, c. 74 (Act for the abolition of Fines and Recoveries, &c.), which Mr. Wendell eulogizes as a "model of legislative draughtsmanship" (see Wendell's Blackstone, vol. 2, p. 364, note), the tenant to the *præcipe* must have been actually seised of the freehold (Burr. 60; 3 B. & Cr. 388); hence a tenant in tail could not have suffered a recovery if the legal estate of the freehold was outstanding in a third person as tenant for life or for a greater estate, without concurrence of the tenant to the *præcipe* or writ of entry: Wendell, p. 314. But now, says the same authority, "Under this act, the tenant in tail's disposition is effectual against all persons whose estates are to take effect after determination, or in *defeasance* of the estate tail." And further, he says: "It expressly enables tenants in tail to alien in fee, in case of a tenancy in tail in remainder, expectant upon a particular estate or estates of a given description; it institutes a functionary, styled Protector of the Settlement; it restrains tenant in tail, there being a protector, from aliening as against posterior takers, without the consent of the protector." But this is only in the case of a tenancy in tail in remainder expectant upon a particular estate or estates of a particular description. But perhaps it will be as well to give a brief analysis of the principal clauses of the act itself. *Estate* is, by the act, defined to mean any interest, lien, or encumbrance, either at law or in equity, in, upon or affecting lands, or money, subject to be invested in the purchase of lands. *Base fee* is to mean exclusively the estate in fee-simple, into which an estate tail is converted, when the issue in tail are barred, but subsequent remainder-men are not. *Estate tail*, in addition to its usual meaning, is to include a *base fee*. *Actual tenant in tail* is one whose estate has not been barred, although it may have been divested or turned to a right. *Tenant in tail* is either an actual tenant in tail, or one who would have been such if the estate had not been converted into a base fee." Id. Wendell. By sect. 19 (after 31st December 1833). "In every case in which

an estate in any lands shall have been barred and converted into a *base fee* (either before, or on or after that day), the person who, if such estate tail had not been barred, would have been actual tenant in tail of such lands, shall have full power to dispose of such lands against all persons (including the king's majesty, his his heirs and successors) whose estates are to take effect after the determination or in defeasance of the base fee into which the estate tail shall have been converted, so as to *enlarge the base fee* into a fee-simple absolute, saving the rights of persons in respect of *estates prior* to the *estate tail* which shall have been converted into a *base fee*, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made." In relation to this clause, Mr. Wendell says, "Under this act the tenant in tail's disposition is effectual against all persons whose estates are to take effect after the determination or in *defeasance* of the estate tail." By § 22 and following: "If at the time when there shall be a tenant in tail of lands under a settlement, there shall be subsisting in the same lands *under the same settlement* any estate for years, determinable on the dropping of a life or lives, or any greater estate, not being an estate for years (including an estate tail, and including estates merely restored or confirmed by the settlement), *prior to the estate tail*, the person who shall be owner of such prior estate, or the first of such prior estates, if more than one, then subsisting under the settlement, or *who would have been such owner if no absolute disposition thereof had been made*, shall be protector of the settlement of the lands included in such prior estate, notwithstanding any charges upon or alienation of such prior estate," &c. And, "If there be several owners of such estate under the settlement, each owner is to be a protector in respect of the undivided share over which the settlement gave him power. If a married woman be protector, her husband shall be joined with her, unless the estate is settled to her separate use."

By sects. 19 and 29, the tenant of an estate tail not barred, and although turned to a right, whether in possession, &c., has power over the fee absolute, subject only to the estates prior to the estate tail: *Doe v. Lord Scarborough*, 3 Adol. & Ell. 43, 897. Tenant in tail in remainder may bar the estate tail without the consent of protector: sec. 34; *Slater v. Dangerfield*, 15 M. & W. 263.

The concurrence of protector is required in barring estates tail in remainder, in order to preserve, *under certain circumstances*, the

control of the tenant for life over the remainder-man. See Sugden's Vendors and Purchasers 404-474, ed. 14.

By sect. 15, a tenant in tail in contingency is authorized to bar estate tail and remainder over: Sugden's Property Statutes 192; Hayes's Convey., 5th ed., 197, n.

It should be observed that the statute *De donis* is not repealed by the act, and the word "tenements," therein used, is defined by Sir EDWARD COKE to mean all corporeal hereditaments whatever.

By sect. 35 of the act we have been considering, "when the estate tail shall have been converted into a base fee, the consent of the protector, if any, shall be requisite to enable the person who would have been tenant in tail, if the same had not been barred, to exercise the power of disposition under this act."

The powers given by this act are not to extend to *expectant* heirs in tail or to tenants in tail after possibility of issue extinct, or to tenants in tail who by the 34 & 35 Hen. 8, c. 20 (an act to unbar feigned recovery of lands of which the king is the reversioner), or by any other act, are restrained from barring their estates tail.

The usual plan adopted is for an eldest son, when about to marry, to join his father as before described; or if his father be deceased, then by his sole act to bar the entail and resettle the estate upon the trusts of his marriage settlement. He is thus enabled to sell portions or effect mortgages to meet family exigencies, and by constituting himself simply a tenant for life in his turn, with remainder to his first and other sons in tail, to preserve the estate for at least another generation. If mortgages are created, of course a power of sale is introduced in favor of the mortgagees, but as transfers are readily made when necessary, such a power is seldom put in force. In the case of the father living at the time of such arrangements, the son's consideration for complying takes the form of an annuity during his father's life, to which otherwise he would not be entitled. The father, on the other hand, is thus enabled to raise a loan for his younger children or for other purposes. In fact, it is only by an arrangement in the nature of bargain and sale, that the entail is carried on, or by the forbearance of the son to disentail without having effected a fresh settlement of the estate.

By 1 & 2 Vict. c. 110, s. 13, a judgment or decree of a court of law or equity, establishing a creditor's rights, has the effect of charging the amount to which he is entitled upon all estates tail

belonging to the debtor, as against the issue and remainder-men, so far as the debtor himself could by the proper means have barred such issue or remainder-men.

Copyholds cannot be entailed except by special custom. In some manors there is an express custom prohibiting entails.

Chattels, real or personal (including leaseholds), cannot, strictly speaking, be entailed, but may by deed of trust be as effectually settled as an estate of inheritance, if it be not attempted to render them inalienable beyond the period allowed by law, *i. e.*, for a life or lives in being and twenty-one years afterwards with, in addition, in the case of $\frac{1}{4}$ posthumous child, the period of gestation. See *Gilb. on Uses*, by Sugden, 121, n. (4).

It will be seen, from the foregoing, that estates are, necessarily, constantly in the market, notwithstanding the law of entail, and that landed estates from a few rods to 100,000 acres are daily submitted to sale by public auction, or become the subject of private contract.

As any foreigner may now acquire real estate, either by purchase or devolution of law, it is at least satisfactory to know that there is no lack of such investment. Not that the investment itself, with its low rate of interest, arising from the great competition for the possession of land in so limited an area as Great Britain, offers many attractions to an absentee proprietor, but there may be many occasions, in connection with manufacturing and mining interests or co-operative undertakings, where it might be desirable to possess a real estate interest, which until recently a foreigner could not acquire except through the medium of a trustee, and even then, in case of litigation, it is at least questionable whether the courts would have given effect to such a trust, as being in contravention of the common law of the realm, and an evasion which at least a court of equity could not sanction.

Such a difficulty, however, no longer exists, and although purchases by aliens under the rights conferred by 33 & 34 Vict. c. 14, would, probably, for the most part, be effected through the intervention of English lawyers, it is not the less interesting to Americans to know that they can thus acquire whatever they may desire, whether they are resident at home or abroad.

The discovery of an heir in America to a considerable estate in England, would, on the other hand, afford scope to American law-

yers for no inconsiderable knowledge of the real property law of England, and some acquaintance with its principles, its tenures and its rules of inheritance, may not, therefore, in the present day, be deemed superfluous. Such a general historical knowledge is probably required in all *bona fide* legal examinations, and eminent American jurists are well versed in such lore; but it is the practical application of such knowledge to the changes and circumstances of the present day, to which we desire to direct the attention of the profession.

It is hardly necessary to add, that the land law in England is the same for all classes. The smallest and humblest proprietor holds his estate by the same tenure and rule of inheritance as the highest nobleman. The law of *primogeniture* and entail are alike open to all, either to accept and adopt or to repudiate and defeat, as we have essayed to describe.

In Ireland, the facilities of sale and transfer of land are even greater than in England; the Encumbered Estates Act, passed shortly after the Irish famine, making short work of the whole fabric of entails and settlements, whether upon the petition of the proprietor or any judgment-creditor.

Of the land law of Scotland, we are scarcely prepared to speak; the law of Scotland, on almost every subject having but little affinity to the law of England; but at all events the power given by the 33 & 34 Vict. c. 14, to aliens, both to acquire and inherit real estate, applies to the whole of the United Kingdom of England, Scotland and Ireland. The laws of inheritance may be said to be the same in both England and Ireland, but as by the law of Scotland *ante nati* children are legitimated by the subsequent marriage of their parents, whether in that country or in any other country where the law of *subsequens matrimonium* prevails (although such law obtains no recognition for the purpose of inheritance in England or Ireland), the law of marriage and legitimacy might form an important ingredient in the investigation of a Scotch inheritance. See Weightman's Law of Marriage and Legitimacy, published by Henry Sweet of London.

A few references to the state of the law on this subject in the former American colonies of Great Britain, both before and after the Revolution and Independence of the United States, may not be without interest.

Prior to the Revolution the law of *primogeniture* and entail was introduced into the American colonies as part of the common and

statute law of the mother country, and, strange to say, entails were greatly favored. Notably in Virginia, the statute *De donis* was in full force, and in the year 1710, lands were protected from being barred by *fine* and *common recovery*, the legal fiction resorted to in England. Even slaves were rendered capable of being entailed by an Act of the local legislature passed in 1727. In 1734, however, small estates, not exceeding 200*l.* in value, were authorized to be barred by a proceeding termed *ad quod damnum*. Estates above that value could only be barred by an Act of the Assembly. "I believe," says Judge HENRY ST. GEORGE TUCKER, "when this was done, a settlement of other lands equivalent in value was always required." Commentaries of the Laws of Virginia, book ii., c. 6.

In Pennsylvania, as early as 1799, a statute was passed giving the tenant in tail in possession the power to bar the entail by a deed of bargain and sale, without recourse to the process of fine or recovery which had previously existed as part of the common law of the state.

In the state of New York, the fiction of Fines and Common Recovery, was abolished by statute: see 2 R. S. 243, § 24. Up to that time such a resort must have been still in use for barring entails of lands of inheritance.

In fact the practical effect of settlement and limitations of future and contingent interests in property of every description is much the same in both countries, public sentiment in Great Britain favoring the law of primogeniture and entail in the abstract, but offering facilities to those who desire to escape it. The same public sentiment in the United States favors an equal distribution, and an open market for land in the abstract, but affords all reasonable facilities to those who, having acquired property, desire to dispose of it in a way most congenial to themselves.

HUGH WEIGHTMAN.

RECENT AMERICAN DECISIONS.

Court of Chancery of New Jersey.

TODD v. RAFFERTY'S ADMINISTRATOR.

Profits made secretly by one of two partners, in the business of the firm, are partnership property.

The Statute of Limitations applies to actions of account between partners.

Where the accounts between partners have been closed for six years, and there has been acquiescence for that period, without fraud, the statute constitutes a bar;

but the statute affords no defence in a case where there have been dealings within six years.

The statute does not begin to run against each item of an account between partners, from the time it becomes a part of the account ; but if part be within six years, it draws that which is before after it.

When the court assumes jurisdiction on the ground of fraud, the statute only begins to run from the discovery of the fraud.

A court of equity will not sit as the divider of gains which are the proceeds of crimes or frauds involving moral turpitude. And profit by an agent to buy, who is also secretly the seller, is the product of a fraud within this rule.

ON final hearing on bill, answer and proofs.

This was a suit by a surviving partner, against the administrators of his deceased copartner, for an account. In January 1859, Todd and Rafferty formed a copartnership, to carry on the business of manufacturing and selling machinery, and also for the purpose of doing a general commission and agency business for the purchase and sale of machinery and machinists' and railroad supplies. This relation continued until March 1872. They then discontinued business, and transferred a part of their assets to a corporation known by the name of the Todd & Rafferty Manufacturing Company. No formal dissolution was ever agreed upon, and it was admitted that the partners never finally settled or adjusted their affairs. The works at which their machinery was made were located at Paterson, and this part of the business was managed by Todd ; they also had an office and store in the city of New York, where their sales were principally made, and the mercantile part of their business conducted. Rafferty had charge of this part of the business. A separate set of books was kept at each place. Rafferty died in July 1872, and the bill in this case was filed March 28th 1876, after an unsuccessful effort had been made to settle the matters in dispute by arbitration.

Socrates Tuttle, for complainant.

William Pennington and *A. B. Woodruff*, for defendants.

VAN FLEET, V. C.—The bill exhibits but a single ground of complaint, viz., that Mr. Rafferty, during the existence of the partnership, carried on a part of its business secretly, without entering it upon the books of the firm, and appropriated the profits to his own use. The sum thus withdrawn, it is said, exceeds \$30,000. The proofs in demonstration of this charge are complete. The private books of Mr. Rafferty, in which this business was entered, are in

evidence. They show that, up until within about three years of the discontinuance, he carried on a very considerable business, precisely like that carried on by the firm, and took the profits to himself. The evidence, in my estimation, renders it equally certain that such business was carried on clandestinely. A partner, having equal rights and powers, and pursuing business for profit, would never willingly consent that so valuable a part of the joint business should be diverted by his associate to his own benefit. In the absence of an express stipulation to the contrary, the parties to a contract of copartnership always understand, from the very nature of the relation, that all gains made by either in the prosecution of the common business, shall be joint property. Generally, a copartnership is a combination of the capital, skill, industry and influence of two or more persons for the prosecution of a particular business for their mutual benefit, and a claim by one that he has a right to carry on a part of the joint business for his own advantage, and to the manifest injury of his associates, is so utterly destructive of the rights and duties legally incident to the relation, that it will never be sanctioned by a court until it is clearly shown that he holds such right by the assent of his associates. It is certain that the existence of such right should not be inferred from slight circumstances, and that is all there is to support it in this case. I consider the fact clearly established, that Mr. Rafferty carried on clandestinely, a part of the business which he and the complainant had associated themselves together to prosecute for their joint benefit, and, consequently, I deem it to be entirely beyond dispute that the complainant is entitled to an account of such business, and to be awarded a share of its profits, unless some other sufficient defence has been shown.

But the defendants insist that the complainant's right of action is barred by lapse of time, and they have invoked the protection of the Statute of Limitations by their answer. It will be remembered that the business of the partnership was discontinued in March 1872, but no final settlement was then had, nor had been previously made, and that this suit was commenced March 28th 1876. The business carried on by Mr. Rafferty, in fraud of the complainant, ceased in January 1869. More than six years elapsed between the cessation and the commencement of this suit. This is the delay on which the defence rests.

The statute undoubtedly embraces actions of account, either at

law or in equity, between partners: *Cowart v. Perrine*, 3 C. E. Green. 457. And where the accounts have been closed for six years, and there has been acquiescence for that period, unexplained by circumstances and not countervailed by an acknowledgment, the statute constitutes an insuperable bar: *Barber v. Barber*, 18 Ves. 286; *Tatam v. Williams*, 3 Hare 357; Story on Part., § 233, n. 4; Coll. on Part., § 374. But the statute has no application to a case where there have been dealings within six years, where assets have been converted into money, or assets have been applied in discharge of partnership liabilities within that period, and no settlement has ever been made. And in such a case the statute does not begin to run against each item from the time it becomes a part of the account, but if a part of the account be within six years, that part of it draws after it the items before six years, so as to protect them from the statute: *Stout v. Seabrook's Ex'rs*, 3 Stew. 187; *Coster v. Murray*, 5 Johns. Ch. 530; *Miller v. Miller*, Law Rep. 8 Eq. 499; *Atwater v. Fowler*, 1 Edw. Ch. 423. In the case last mentioned, the court said, until the business of winding up the affairs of the partnership is in such a situation that an account can be stated, and its affairs finally closed, the partner asking relief is not in laches in not demanding an account. Applying these rules to the facts of the case in hand, it is perfectly obvious the statute does not afford even the shadow of a defence.

But even if the partnership dealings appearing upon the books of the firm had been fully settled and closed for more than six years prior to the bringing of this suit, still the defence of the statute would be unavailing to the defendants, for the rule is well established in equity, that where the complainant's action is grounded on a fraud, which the defendant has concealed until sufficient time has run to enable him to set up the statute, the statutory period will not be considered to have commenced until the fraud is discovered, or would have been discovered had reasonable diligence been exercised: *Angell on Lim.*, § 183; *Story's Eq. Jur.*, §§ 1521, 1521 a; *Hoveden v. Lord Annesley*, 2 Sch. & Lef. 634; *Meader v. Norton*, 11 Wall. 458. Vice-Chancellor WIGRAM, in *Blair v. Bromley*, 5 Hare 541, said, where the court assumes jurisdiction on the ground of fraud, the statute only begins to run from the discovery of the fraud; and this doctrine was reiterated by Lord COTTENHAM when the case came before him on appeal: 2 Phil. Ch. 354. In *Brooks-bank v. Smith*, 2 You. & Coll. (Exch. Eq.) 60, Baron ALDERSON

said, courts of equity adopt the Statute of Limitations to assist their discretion. In cases of fraud, however, they hold that the statute runs only from discovery, because the plaintiff's laches does not commence until he is acquainted with the circumstances. Chief Justice PARKER held, in *Farnam v. Brooks*, 9 Pick. 244, that, even at common law, fraud, if not discovered until within six years before action brought, was a good answer to the statute; but this view is unquestionably opposed to the general current of judicial opinion: *Troup v. Smith*, 20 Johns. 46; *Allen v. Miller*, 17 Wend. 204; *Smith v. Bishop*, 9 Vt. 110; *Fee v. Fee*, 10 Ohio 469; *Clarke v. Marriott*, 9 Gill 331. But it will be found these cases uniformly concede that it is an established doctrine of equity jurisprudence, that a defendant will not be permitted to avail himself of the statute, when it appears he has, by fraud, prevented the complainant from coming to a knowledge of his rights. In my opinion, it is not possible to take any view of this case which will make the Statute of Limitations a bar to the complainant's action.

It is admitted that part of the gains made by Mr. Rafferty, in the business he carried on secretly, were obtained by the practice of fraud. Instances are shown where acting as the agent of a purchaser, he would purchase at one price and sell to his principal at a price considerably larger, thus becoming both seller and purchaser, and getting both commissions and a profit. The complainant claims a share of the gains thus fraudulently made, and he grounds his right on a series of cases which hold that, when an illegal or fraudulent transaction has been completed, and the money earned by it, being due to two or more persons, has been received by one or a third person for the wrongdoers, an action will lie in favor of any one of the wrongdoers for his share. It is claimed for this doctrine, that it does not violate that salutary principle of juridical ethics which declares that a court will never lend its aid in the enforcement of a contract founded in immorality or illegality, for, it is said, in such cases the illegal transaction being fully completed, the court, in compelling the wrongdoers to divide, does not enforce the original contract between the parties, but proceeds upon an implied promise arising from the reception of the money, and that such implied promise is so entirely distinct from the original arrangement as to be, in legal estimation, free from its taint. This view, substantially, has been adopted in the following cases: *Faikney v. Reynous*, 4 Burr. 2069; *Petrie v. Hannay*, 3 T. R. 418;

Tenant v. Elliott, 1 Bos. & Pul. 3; *Farmer v. Russell*, Id. 296; *Nash v. Ash*, 1 Eden 379; *Watts v. Brooks*, 3 Ves. 612; *Sharp v. Taylor*, 2 Phil. Ch. 801; *McBlair v. Gibbes*, 17 How. 232; *Brooks v. Adams*, 2 Wall. 70; *Woodworth v. Bennett*, 4 Hand 273; *Merritt v. Millard*, 4 Keyes 208.

But this doctrine has been repudiated with considerable sternness, in this state, by this court and also by the Supreme Court. In *Watson v. Murray*, 8 C. E. Green 357, one of several partners brought his bill for the dissolution of a copartnership engaged in carrying on the lottery business, and asking, also, for the sale of its property and a distribution of its assets. Although it did not distinctly appear by the pleadings (the case was heard on demurrer) where the business had been carried on, in order to put the case in the best possible shape for the complainant, it was assumed it had been carried on in states where such business was lawful. Vice-Chancellor DODD held that the action could not be maintained, characterizing it as an attempt to use the power of the court to apportion among criminals the gains resulting from their crimes. The lottery business, by our law, is a misdemeanor, and any gains resulting from its prosecution, whether carried on here or elsewhere, must, in our tribunals, be regarded as the spoils of crime.

The case presented to the Supreme Court was less offensive in its moral features. It was an action to recover part of the proceeds of a transaction simply illegal, not criminal. The plaintiff and defendant were doing business separately as loan brokers. They had an arrangement by which they were to assist each other, and under which, if the plaintiff sent a customer to the defendant for whom he procured a loan, he was to be entitled to half the commissions received by the defendant. It was understood that the commissions to be charged were to be in excess of the rate allowed by law. Chief Justice BEASLEY, in stating the reasons why he could not assent to the rule which would constrain a court to sit as the divider of such gains, said: "Until the money, which is the wages of the ill-doing, has come into the hands of the several delinquents, the illegal transaction, so far as they are concerned, is not closed, and unless the matter has been entirely concluded by such adjudications that it would be but captiousness to dissent from them, it might well be worth consideration, whether it would not be more consistent with the usual course of the law, and more protective of public interest, to proclaim the outlawry of such affairs

from the first step to the last. If A. and B. make sale of forged papers, and the proceeds are paid by the purchaser to A., a court of law can scarcely be said to perform either a very respectable or useful function when it assists B. in obtaining his share of the profits of the business. Nor would it seem that it should give much concern to those who dispense public justice, if one of two such delinquents should be successful in fraudulently withholding from his companion a share of the wages of iniquity. Under such conditions, the assistance of the law might, it would seem, be rightfully refused, not for the sake of the party who thus cheated his associate in guilt, but in order to render such affairs as precarious and difficult as possible to those who might be inclined to enter upon them:" *Gregory v. Wilson*, 7 Vroom 320. These adjudications, in my judgment, definitely settle the principle which must be applied in declaring the rights of the parties to this suit.

It is true, the gains sought to be recovered in the cases just referred to, resulted from ventures carried on in defiance of positive statutory prohibitions, but the rule which declares that an agent, authorized to buy, shall not himself become the vendor, and that any profit secretly made by him, in violation of this rule, is the fruit of fraud, has all the force a legal rule can have. It is rooted in justice and sound policy, and stands prominent among those cardinal principles of justice which have received the approval of the general judgment of mankind as being indispensable to the promotion of honesty and fair dealing. In my estimation, there is little ground for comparison, on the score of the moral quality of the acts, between an open demand and acceptance of illegal brokerage and the secret betrayal of confidence. The first is simply an open violation of law, while the latter adds to the wrong of the first, secret treachery. The first is the doing of an act prohibited by law, while the latter is the commission of a wrong intrinsically evil. But little distinction can be made between this mode of cheating and obtaining money by false pretence, and it is quite probable some of the gains in dispute were the product of that crime.

But it is said the complainant is liable, as surviving partner, to the persons defrauded, for the whole amount fraudulently gained, that, in such a case, right and liability should be reciprocal. The general rule may be admitted to be that all the members of a firm are liable for the fraud of one of their number, committed in the business of the partnership, though they in no way participated in

the wrong, and derived no advantage from it, and though the frauddoer alone was benefited by the fraud: Gow. on Part. 55; Story on Part., § 108. But that question is not before the court, and cannot be determined in this suit. And even if the complainant's liability was clear, that fact would not, at this time, afford him a right to the judgment he claims. Generally speaking, wrongdoers cannot ask for contribution, and this rule is just as applicable to partners as to others: Story on Part., § 220. Cases may possibly occur where the innocent members of a firm may in consequence of their association, be required, as to third persons, to bear losses which, as among themselves, should be wholly borne by the wrongdoing member. In such a case it would seem that contribution, or even full indemnity, would be an act of justice, but it would also seem to be clear that such relief should not be given on the bare possibility that a loss of that character may hereafter ensue. Relief in such a case should not go in advance of harm. The consideration of the question whether the complainant has a remedy or not, on this ground, may, very properly, be deferred until he has actually suffered wrong. His wrongs at present, under this head, are purely anticipatory.

I find nothing in the case which entitles the defendants to an account from the complainant of the business carried on by him in connection with other persons than Mr. Rafferty. Such business was totally dissimilar, in every point of view, from that conducted by Mr. Rafferty and the complainant, and its prosecution took nothing from the latter concern to which it was in anywise entitled, and, so far as can be perceived by any light furnished by the proofs, its prosecution could not in any way injure or prejudice the latter concern.

The complainant is entitled to an account of the partnership dealings, and such account must include all gains lawfully made by Mr. Rafferty during the term of the partnership, in selling machinery and machinists' and railroad supplies, whether manufactured by the partnership or by others; and, also, all gains lawfully made by him in purchasing, for others, machinery and machinists' and railroad supplies.

A reference will be ordered, in order that an account may be taken in conformity with the principles herein stated.

One of the questions involved in the decision of the above case is one generally considered as of some difficulty, and upon it the Vice-Chancellor has

spoken in no faltering accents, but has given an opinion, such as one delights to meet with—a clear declaration that a court of justice will not lend its aid to the carrying out, either directly or indirectly, of an illegal contract, or to assist a party thereto in reaping the fruits thereof.

The rule undoubtedly is, that a court of justice will never lend its aid to the enforcement of a contract founded on immorality or illegality. That this rule should be so extended that a court will refuse its aid in the division of the spoils of such a contract, or in the apportionment of the losses arising therefrom, even though a subsequent contract is made with reference thereto, seems to us a position founded in the highest and best public policy. It deprives those engaged in illegal contracts of all hope that in any way they can have a remedy in case their companions in wrongdoing behave dishonestly towards them, and thus makes all appreciate the full risk run in an illegal transaction. This position has, however, been by no means generally taken, and many and ingenious have been the arguments by which courts have been justified in becoming the dividers of profits arising from illegal contracts. These arguments seem based principally on a mistaken desire to do indirectly what the law will not do directly, produce equality amongst wrongdoers; as said by Sir ROBERT HENLEY, they see "No reason why some of the parties, and perhaps the worst, should run away with the whole stock and profits, and the court ought to make them just to one another." *Nash v. Ash*, 1 Eden 378.

It may be said the partner claiming an account has frequently been guilty of no moral or illegal misconduct; his partner has used partnership funds in an illegal traffic, and has made money thereby; the plaintiff has not known of the transaction until the traffic is over the profits made; why then should the

more guilty party be permitted to retain all the advantage? Suppose such a case—let us remember that it is from no tenderness towards the defendant, that, even in cases where direct enforcement of an illegal contract is sought, the court refuses to interfere, but beyond this, does not a partner in the case proposed, come into court with at least some amount of moral guilt attached to him? He comes into court and demands a share of illegally made profits, claiming it as *his* share. Does he not, thereby ratify the acts of his partner and declare that, in the very illegal transaction from which the profits arose, his partner was acting as his agent? Would not the course of a high-minded and honorable man be to refuse to touch profits coming by a tainted channel; to insist on an account of his capital and all legitimate gains only, and refuse those made by fraud or illegality? By suing for them, he would seem to make himself, on the well-known maxim, a participant by relation in the wrong of his comrade. This consideration would seem to dispose of the distinction at times taken between profits from a partnership formed for the purpose of carrying on an illegal business, and profits which arise from an occasional illegal act done by a partnership carrying on a perfectly legitimate business. Each illegal act should stand and be considered by itself, and in this respect the opinion of the famous council which sat in judgment on Don Quixote's books is very sound.

Another distinction often attempted is between dividing the profits of a transaction which is *malum in se* and one merely *malum prohibitum*. Now whatever the distinction between *malum prohibitum* and *malum in se* is worth in abstract morals, or in the eyes of a professor of casuistry, its value for the purpose of legal administration is very slight. In fact, *malum prohibitum*, from the obligation, which for the repose and well be-

ing of the community, all are under to obey the constituted law, becomes in many instances *malum in se*; and besides, the commission of an act, *malum prohibitum*, has equally with the commission of one *malum in se* a tendency to beget a disregard of law as law. On the subject of the relation of the obligations of positive law to ethics, see the lecture of Judge HARE, before the Law School of the University of Pennsylvania, delivered at the opening the term 1877-8. 34 Leg. Int. 346.

The present case ignores all the above distinctions, and holds that the law will simply drive parties to an illegal contract, and those who endeavor subsequently to participate in illegal gains, from its judgment-hall, to settle their differences as best they may. Such, however, has not been the steady course of decisions, or even, we may say, the resultant of the authorities; indeed, we find in the books, no case so positive, so far reaching as the present one; for even in *Gregory v. Wilson*, *infra*, the court say that the plaintiff knew that an illegal rate of interest would be charged, while in this case the illegal business was carried on clandestinely and concealed from the plaintiff. A review of the authorities in England and in this country, may, therefore, not be uninteresting. In *Barjeau v. Walmsley*, 2 Str. 1249, a recovery was allowed for money loaned to play with, and in *Nash v. Ash*, 1 Eden 878, Sir Robert HENLEY, L. K., favored a bill for an account of profits of a gambling partnership. In *Holman v. Johnson*, 1 Cowp. 341, Lord MANSFIELD thus explained the policy of the law in refusing to enforce illegal contracts: "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is allowed; but it is founded in general principles of policy, which the defendant has the advantage of, con-

trary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this, *ex dolo malo non oritur actio*. * * * If from the plaintiff's own showing or otherwise the cause appears to arise *ex turpi causa*, or from the transgressor of a positive law of this country, there the courts say he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." The principle here stated, might well, we think, have carried his lordship further than it did; for the distinction taken between enforcing an illegal contract and distributing the proceeds thereof when completed, rests very largely on Lord MANSFIELD's authority. The leading case on this subject is *Faikney v. Reynous*, 4 Burr. 2069 (1767), which was an action on a bond. The defendant pleaded that the plaintiff and one Richardson (co-obligor with the defendant, as it appears from a note in 3 T. R. 418), were jointly concerned in contracts illegal under the Stock-jobbing Act; that the plaintiff advanced certain money in settlement of differences, and for not performing contracts, &c., and that the bond was given for the repayment of said advances. The plaintiff demurred. Lord MANSFIELD took the distinction above alluded to between things *malum prohibitum* and *malum in se*, and also held the advance of money in payment of joint losses on the contract stood on a different basis from the contract itself, and said "one of these parties had paid money for the other and on his account, and he gives him his bond to secure the repayment of it. This is not prohibited. * * * This is certainly a fair transaction between these two. If money be lent in order to pay off an usurious contract, or even to lend out upon usury and a bond be given for securing the repayment * * * such a bond will not

be void, the obligor will be bound to pay it.' This case was followed, and if anything, the principle carried farther in *Petrie v. Hannay*, 3 T. R. 418 (1789), in which money had been paid for losses by one of two persons jointly interested in an illegal stock transaction, and contribution was sought by him from the other, and the court allowed a recovery on the promise of the defendant to contribute. Lord KENYON, however, dissented from the judgment of the majority of the King's Bench, and it is to be noticed that in a case before him at *nisi prius* in the same year, where contribution was sought for a loss incurred by underwriting in partnership, in violation of the Act of 6 Geo. 1, he declined to permit a recovery. The case of *Sullivan v. Greaves*, Park. Ins. 8, was as follows: The plaintiff was an underwriter, the defendant, a broker; a policy was issued bearing the name of the plaintiff only as insurer, but in which one Bristow had agreed to take half of the risk. A loss occurred, the plaintiff paid the assured, and Bristow paid his half to the defendant, the broker, who held it. Lord KENYON took no notice of the doctrine of a distinct contract or obligation to pay money, but said "the plaintiff is himself the underwriter, who comes to enforce an illegal transaction; it is a partnership *pro hac vice*, and this party cannot apply to a court of justice to enforce a contract founded in a breach of the law." Of course as the *nisi prius* decision of a single judge, this case is hardly authority, but it is of use as showing the dissent of a strong legal mind from the prevailing doctrine.

In *Seers v. Lashley*, 6 T. R. 61 (1794), the court took a distinction between money subsequently advanced in settlement and a loan in the very transaction complained of as illegal, and, while not attacking the foregoing authorities, held that a bill given for differences in value of stock in an illegal stock-jobbing transaction could not be recovered

upon. This decision was followed in *Brown v. Turner*, 7 T. R. 630 (1798). In *Brown v. Hodgson*, 6 T. R. 405 (1795), the King's Bench still carefully guarding against attacking the authority of *Faikney v. Reynous* and *Petrie v. Hannay*, held that where A., B. and C. had become partners in insurance, illegally, but all the policies were underwritten by A. alone, he could not recover moneys received for the said policies by his partner C., and an outside person, D., as brokers.

In *Mitchell v. Cockburne*, 2 H. Bl. 379 (1794), EYRE, L. C. J., in the Common Pleas, distinguished the case before him from the leading cases in the King's Bench, but remarked as to *Faikney v. Reynous*, "Perhaps it would have been better if it had been decided otherwise. * * * But be that as it may, it is sufficient now to say that those cases go one step short of the direct illegal transaction, but that the present case arises immediately out of it." When, however, the question came directly before the Common Pleas, that court agreed with the King's Bench, and, indeed, took very broad ground. In *Tenant v. Elliott*, 1 B. & P. 3 (1797), the defendant, a broker, had insured for the plaintiff, a British subject, goods bound from Ostend to the East Indies, on board of a foreign ship, which insurance was illegal under the Act of 7 Geo. 1, c. 21. The goods were lost, and the underwriter paid the money, due upon the loss, to the broker, from whom the plaintiff sought to recover it. A recovery was permitted, EYRE, L. C. J., saying: "The question is, whether he who has received money to another's use, on an illegal contract, can be allowed to retain it, and that not even at the desire of those that paid it to him? I think he can not." *Farmer v. Russell*, 1 B. & P. 296 (1798), is a case of considerable interest and seems to go very far. The defendant agreed to carry for the plaintiff certain goods called

"medals," and to deliver them at Portsmouth to a certain person, receive cash for them and pay over to the plaintiff. In fact the "medals" were counterfeit half-pence, intended for circulation among the sailors. The defendant delivered them, received pay from the consignee, and accounted to the plaintiff for all but 13*l.*, for which the action was brought. Before ROOKE, J., at *nisi prius*, a verdict was given for the defendant, on the ground of the illegality of the contract; but the court in banc granted a new trial. On the argument counsel endeavored to distinguish between this case and *Tenant v. Elliott*, the dealing in counterfeit money being *malum in se*. The distinction, however, was not adopted by the court. EYRE, L. C. J., said: "It seems to me that the plaintiff's demand arises simply out of the circumstance of money being put into the defendant's hands to be delivered to him. This creates an assumpsit in law. * * * Though the court will not suffer a party to demand a sum of money in order to fulfil an illegal contract, yet there is no reason why the money in this case should not be recovered, notwithstanding the original contract was void." BULLER and HEATH, JJ., regarded the case as ruled by *Tenant v. Elliott*. ROOKE, J., in the course of a strong dissent, said: "I think that a man who has been guilty of an indictable offence ought not to have the assistance of the law to recover the profits of his crime, and that whether his agents be innocent or criminal. * * * If a plaintiff will employ an agent in such a transaction, he must rely on the honesty of his agent, and I think the law ought not to assist him."

In *Watts v. Brooks*, 3 Ves. 612 (1798), the question came into chancery. An illegal insurance partnership, in the business of which the policies were underwritten by one partner only, was dissolved, and one of the partners filed a bill for an account; a decree was

resisted, on the ground that it would be in furtherance of an illegal transaction; but Lord LOUGHBOROUGH said: "Where the parties have had dealings together upon a variety of transactions, and losses have been incurred and paid, and a general account is sought, I do not execute the contract against law, but I should do injustice if I did not give the advantage, if any advantage have arisen, or charge any loss which has happened. If it were a smuggling business, and there had been profit or loss upon a course of smuggling transactions, I should do great injustice if I did not bring that into the account." There was a decree for a general account. It may, however, be remarked that the chancellor's dictum, as to the smuggling transaction, was overruled in *Thompson v. Thompson*, 7 Ves. 470 (1802). See also *Vandyke v. Hemett*, 1 East 6 (1800); and in *Knowles v. Haughton*, 11 Ves. 168 (1805), the authority of the case was much shaken by the disapproval of Sir WILLIAM GRANT.

In *Ex parte Daniels*, 14 Ves. 191 (1807), Lord ELDON, C., expressly disapproved of *Falkney v. Reynous*, and *Petrie v. Hannay*, but no decree was made, and the case was eventually compromised. Lord ELDON had previously, while Chief Justice of the Common Pleas, doubted the soundness of the two cases just named. In *Aubert v. Maze*, 2 B. & P. 370 (1801), the plaintiff and defendant had entered into an illegal insurance partnership; the plaintiff paid losses and sued the defendant for his proportion thereof. Lord ELDON said: "It has been said that if one partner in an illegal partnership pay money for the other without his authority, the money cannot be recovered; but if the money be paid with his authority, it may be recovered. It seems to me, however, that if two persons engage in partnership in an illegal concern, each gives the other an authority to transact all that business relative to the partnership

without transacting which no profit can ever arise from the concern," and speaking of *Faikney v. Reynous*, and *Petrie v. Hannay*, "it seems to me that if the principle of these cases is to be supported the Act of Parliament will be of little use. HEATH, J., said: "I take it to be by no means settled that if one partner in an illegal concern pay moneys for the other with his consent the money so paid can be recovered. . . . If the concern in which the money be advanced be *malum in se*, it will not be disputed that it cannot be recovered. . . . I do not see any sound distinction between the case of money paid in a concern which is *malum in se* and *usulum prohibitum*. The latter, as well as the former, tends to encourage a breach of the law." It is a little difficult to distinguish this case from some of the foregoing, in which recoveries were allowed, and had the cause of decision stopped here, it would perhaps be questionable law, for *Faikney v. Reynous* is to be considered as authority. In the case of *Sharp v. Taylor*, 2 Phillips 801 (1849), however, Lord COTTENHAM recognised *Tenant v. Elliott* and *Furmer v. Russell* as law, and held that where there has been a partnership in a business carried on in violation of a statute, the illegality will not deprive the one partner of his right to have an account of the gains of such illegal traffic from the other; in the language of the Lord Chancellor, there is a "difference between enforcing illegal contracts and asserting title to money which has arisen from them." So that on the whole, we may regard the distinction as firmly established in England.

In this country, in a very early case, *Coulton v. Anthony's Ex'rs*, 4 Yeates 24, the Supreme Court of Pennsylvania showed a strong desire to take advantage of any circumstances to raise a distinction between an illegal contract itself and a subsequent one indirectly connected with it, but the facts were too

strong to permit the introduction of the distinction into the case.

The Supreme Court of the United States has steadily maintained and acted upon the distinction between the recovery of money arising from an illegal contract and enforcing the contract itself. In *Armstrong v. Toler*, 11 Wheat. 285 (1826), the facts were substantially as follows: Goods were shipped to Armstrong and others, and were libelled in Maine as having been illegally imported; they were delivered to an agent of Armstrong on a stipulation being given to abide the event of the suit, Toler becoming liable for the appraised value. Armstrong, on receipt of his goods, undertook to pay Toler his proportion of any sum for which Toler might become liable. The goods were condemned. Toler paid the amount of the stipulation and sued Armstrong for his proportion thereof. A recovery was allowed. Here the action of the plaintiff seems to have been entirely untainted by the illegality of the original transaction, it having been merely an advance, so to speak, to enable the defendant the better to avail himself of his legal right, the right to defend his cause, or his ownership in a court of justice, by complying with a rule of law. The case, however, is mentioned, because *Faikney v. Reynous*, was cited therein, and because it has been referred to in a later decision of the Supreme Court, which is not quite so free from question. In *McBlair v. Gibbs*, 17 How. 232 (1854), the plaintiff claimed the proceeds of a share of a sum of money received by a company from a contract with General Minos, for supplies furnished in fitting out an expedition against Spain. The defendant resisted on the ground that the share had been assigned to him. The assignment had been held, by the Court of Appeals of Maryland, invalid as in violation of the Neutrality Act of 1794. The Supreme Court recognised as law

Faikney v. Reynous, and *Petrie v. Hanmay*, and cited with approbation *Sharp v. Taylor*. NELSON, J., said, "The transaction out of which the assignment arose, was not infected with any illegality. The consideration paid was not only legal, but meritorious, the relinquishment of a debt * * * the assignment was subsequent, collateral to and wholly independent of the illegal transaction upon which the previous contract was founded. It may be admitted that even a subsequent collateral contract, if made in aid and furtherance of the execution of one infected with illegality, partakes of its illegality, and is equally in violation of law, but this is not this case."

In *Brooks v. Martin*, 2 Wall. 70 (1863), B., M. and F. entered into a copartnership; B. by agreement was to manage the business. B., for the firm, speculated in soldiers' warrants, contrary to law. M. sued for an account of the profits and the court decreed an account. MILLER, J., in his opinion, relied on *Sharpe v. Taylor* and *McBlair v. Gibbs*. CATRON, J., dissented. The case would seem to go much farther than the preceding one, and to be a direct adjudication upon the division of the fruits of an illegal contract; and in that particular, except as to the conclusion arrived at, to be scarcely distinguishable from the principal case.

The law in New York would seem to be the same as is held by the United States Supreme Court. See the opinion of CHURCH, C. J., in *Woodworth v. Bennett*, 43 N. Y. 273 (1870). See also *Merritt v. Millard*, 4 Keyes 38.

Opposed to the above tendency to, if possible, ignore the illegal source of profits, and to distribute them irrespective of how they were made, regarding them simply as a fund upon which certain persons have a claim, stand the courts of Virginia and New Jersey.

In *Watson v. Fletcher*, 7 Gratt. 1 (1850), a bill was filed for the set-

tlement of a partnership. The pleadings did not disclose the nature of the partnership business, but in the course of taking testimony, it appeared that the profits thereof arose from gambling or in keeping a gambling-house. BALDWIN, J., said: "It is clear that a court of equity will not lend its aid for such a purpose, nor give relief to either partner against the other founded upon transactions arising out of their immoral and unlawful partnership, whether for profit, losses, expenses, contribution or reimbursement. * * * There is in the administration of justice but one rational and politic treatment of the mutual claims of such associates, thus springing out of their spoiliations upon society, and that is to refuse them all aid in the prosecution of their respective demands against each other."

In *Watson v. Murray*, 7 C. E. Green 257 (1872), a partner in a firm dealing in lottery tickets, filed a bill against his partner for discovery, the appointment of a receiver, dissolution and distribution of assets. The defendant demurred on the ground of the illegality of the business. DODD, V. C., said: "Is the suit one which this court will entertain? It seems to me plain that it is not. Its object is to consummate a partnership contract entered into and contracted exclusively for the prosecution of an illegal and mischievous business. * * * But it was contended * * * that the court in this case is not asked to do anything in furtherance of lotteries, or to enforce an illegal contract, but simply to compel an accounting and distribution of the profits. This distinction has been taken in authoritative cases." His honor then referred to *Sharp v. Taylor*, *Blair v. Gibbs* and *Brooks v. Martin*, and proceeded to distinguish them, hesitating probably from a natural judicial delicacy to express his disapproval of them, although the distinction between the last-named case

and the one before him seems to us rather fanciful than real. He said, "In these cases * * * the partnership was in no instance formed * * * for a traffic which the law made a crime and a nuisance, the distinction between enforcing the execution of an illegal act and the distribution of the realized profits of the act, made use of in those cases to do justice between the parties is obviously not to be regarded as one of universal or general application. It seems needless to say that it cannot be invoked to apportion among criminals the gains resulting from their crimes."

In *Gregory v. Wilson*, 7 Vroom 315 (1873), two real estate brokers had an agreement that for any customer furnished by the plaintiff to the defendant, for whom the latter should procure a loan, the commissions should be equally divided. The defendant procured a loan for such a customer, and received from him a commission, at a rate above that allowed by law. The plaintiff brought action for one-half the said commission. BEASLEY, C. J., after reviewing the authorities and stating the distinction as laid down in *Farmer v. Russell*, and cases of that class, said: "Now it appears to me evident that this is extending the rule to the very verge of impolicy. * * * Nor is the suggestion made in some of the opinions very reassuring or satisfactory, that in these

cases the transaction alleged to be illegal is completed and closed, and is not in any manner to be affected by what the court is asked to do between the parties, because it is impossible to overlook the circumstance, that if the law lends its aid to the transmission of the gains of the misdeed, the doing of the offence is facilitated for the future. Until the money, which is the wages of the ill-doing, has come into the hands of the several delinquents, the illegal transaction, so far as they are concerned, is not closed." While the review will show the greater number of decisions in favor of the distinction taken, it seems to us that the sounder and better law is to be found in the New Jersey case.

As to one other argument in the principal case, that the plaintiff should be allowed to recover by way of indemnity against his liability for claim, which the persons from whom his partner made fraudulent gains might bring against him, the court well remarks: "Relief in such a case should not go in advance of harm." The law would seem settled that the right to contribution does not exist until actual payment: *Cummings v. Hackley*, 8 Johns. 202; *Maxwell v. Jamison*, 2 B. & A. 51; *Tolman v. Smythe*, 3 W. N. C. 169; *Parsons on Partnership* 287.

H. BUDD, JR.

Appellate Court, Second District of Illinois.

WILLIAM WILSON ET AL. v. PHILIP CONLIN.

Where a park association offered a purse to be divided into four parts, to be given to the winning horses, according to their degree of speed, in a race to be run under certain regulations imposed by the association, one of which required all persons desiring to enter horses to compete for the prize, to pay an entrance-fee equal to ten per cent. on the whole sum to be given; and defendant entered his horse to participate in the race for the purpose of winning the purse, and executed his promissory note to the treasurer of the association for the entrance-fee, but failing to win the prize, refused to pay the note: *Held*, that this was not a gaming

transaction within the meaning of the statute of 1845, declaring void all promises, notes, bills, &c., made upon a gaming consideration; that there was nothing illegal in the transaction, and that defendant was liable upon the note.

APPEAL from La Salle county.

The opinion of the court was delivered by

SIBLEY, J.—The facts argued on in this case are, that the Earlville Park Association offered a purse of \$600, divided into four parts, to be given to the winning horses, according to their degree of speed, in a three-minutes race, to be run under certain regulations imposed by the association.

One of its rules required all persons desiring to enter horses to compete for the prize, to pay an entrance-fee equal to ten per cent. on the whole sum to be given. Appellee was permitted by the association to enter his horse, "La Salle," to participate in the race for the purpose of winning the purse. In consideration of that permission he executed to the treasurer of the association his promissory note as follows:—

"\$60.00. La Salle, August 18th 1873. Eight months after date, I promise to pay to the order of Charles M. Smith, Esq., treasurer, sixty dollars, at his office, value received, with interest at ten per cent. per annum.

PHILIP CONLIN."

This note was endorsed *bona fide* to the appellants, before it became due, for a valuable consideration paid by them. Conlin having failed to win the prize, or any portion of it, refused to pay the note. Suit was instituted before a justice of the peace to recover the amount of it, and the cause taken to the Circuit Court of La Salle county, where a judgment was rendered in his favor, from which the appellants appealed to this court. The only question to be determined is, whether the note was taken in violation of the statute of 1845, then in force, which reads that "all promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages, or other securities or conveyances, made, given, granted, drawn, or entered into, or executed by, any person or persons, whatsoever, where the whole or any part of the consideration thereof shall be for any money, property, or other valuable thing, won by any gaming or playing at cards, dice or any other game or games, or by betting on the side or hands of any person gaming, or for the reimbursing, or paying any money or property, knowingly lent or advanced at the time and place of such play to any person so gaming or betting, or that shall during such play, so play or bet,

shall be void and of no effect." If this was a gaming transaction within the meaning of the statute, then the note was void, and the judgment of the Circuit Court correct.

Gaming is usually defined to be an act done by which something is hazarded on the event of a contest or issue. The association certainly did not hazard anything by merely receiving an entrance-fee. Nor could the simple offer of a premium to the swiftest horse, be converted into a stake that in anywise depended upon the result of the race. If so, a prize offered for the finest animal, the handsomest baby, or the greatest production of intellectual effort, would render the offer liable to the penalties of the statute.

Such a construction must tend to discourage all rivalry in art, in science, in the products of the soil, and the improvement in the various breeds known to the animal kingdom. This construction could not have been intended by the legislature.

To require a fee in advance for the privilege of being admitted to contest for the prize, is no more a gambling process than the offer of a prize to the winning party. There is nothing staked upon the result of a future contingency. The amount to be paid is fixed, and not in any event to be returned, increased or diminished. The law does not prohibit the trial of speed any more than the trial of strength in an animal. Moreover, the person who might pay the entrance-fee, was under no obligation to engage in the race. How could the association know his object in procuring a right of entry, whether it was merely for the purpose of exhibiting the animal on the ground, or put him to a trial of speed? It simply demanded a fee before the horse could enter, and left the owner to determine what course he would afterward pursue. Or even whether he would avail at all of the privilege purchased, was a matter in which the association had no concern. On the payment of the entrance-fee, or the execution of a note taken in lieu of the money, the whole business was completed, and nothing left depending upon the happening of an event, or the trial of an issue. The prize-money was to be paid to the successful party, but the amount was certain, and did not depend at all on the number of entrances. Therefore the entrance-fee had no direct connection with the payment of the prize-money. It was decided in *Applegarth v. Colley*, 10 Mees. & Wels. 723, that a sum of money advanced by a third person as a premium to encourage horse-racing was not a wager, and the deposit could be recovered in a suit by the successful party. The

association in this case was not, in the strict sense of the word, a party engaged in the racing. It had no horse entered for the purpose, and none was run, or proposed to be run, on its account. Therefore, being entirely indifferent as to the result, it occupied the position of a third party to those engaged in running their horses. It is said in *Smith v. Alvord*, a case decided by the Marion Superior Court, Ind., furnished by counsel of appellants, which decision has since been affirmed by the Supreme Court of that state, not yet reported,¹ that "the distinction between the offering a premium by a third person to the successful one of several contestants, and a bet between such contestants is obvious. In the former case, the person who offers the premium stakes nothing. In other words, his liability to pay does not depend upon any contingency. He binds himself absolutely to pay to one or the other of the contestants a certain amount, no matter how the contest may be decided. Although it may be uncertain to whom he will have it to pay; it is certain he will have it to pay to one or the other. There is nothing illegal in this, so long as the contest for which the premium is offered is not in itself unlawful." The case instanced by the counsel for appellee of the game of keno, where a number of persons each pay into the banker a given sum of money, the amount to be won back by any of them being dependent upon the vagaries of the machinery operated by the banker, presents, it is believed (although we are unacquainted with the game), quite a different case from the one before us. So, in respect to that of a given number of persons desiring to organize a horse-race, each one to stake a certain amount, and if one of them were to execute a note to the stakeholder for his stake, could the stakeholder recover in an action upon the note? It may be answered that if the stake was so placed for the purpose of being transferred upon the happening of a future contingency, the arrangement would contain one of the main ingredients of gaming. Indeed, the very idea of stakeholder implies one who holds a deposit, to be disposed of according to the result of a future occurrence, which doubtless comes within the provision of the statute. The case of *Mosher v. Griffen et al.*, 51 Ill. 184, the only one referred to by appellee as opposed to the view here expressed, arose on a claim made by the plaintiff for services rendered in fitting a mare for a race on which money had been bet, and also board and shoeing of the animal. The court said that the training of the mare "we suppose was for the purpose of

¹ This case will be found in 7 Reporter 396.

gaming," and yet reversed the cause, for the reason that the court below refused to allow the plaintiff his claim for board and shoeing; a distinction not less refined than that we have attempted to draw between the Earlville Park Association in receiving an entrance-fee, and offering a reward to the successful horse, and a person betting on the result of the race to be run.

For the reasons indicated, the judgment of the Circuit Court is reversed and the cause remanded. Judgment affirmed.

At the common law contracts by way of gaming or wagering were not, as such, unlawful; and an act of gaming not prohibited by statute is not in general indictable: *Smith on Contracts* *245; *Bish. on Stat. Crimes*, § 846; 1 *Bish. Crim. Law*, 6th ed., § 504, 1135; *Bell v. Norwich*, 3 Dy. 254 b.; *Case of Monopolies*, 11 Co. 84, 87 b.; *West v. Commonwealth*, 3 J. J. Marsh. 641; *People v. Sergeant*, 8 Cow. 139; *State v. Cotton*, 6 Tex. 425; *United States v. Milburn*, 4 Cr. C. C. 719; *Reg. v. Ashton*, 1 E. & B. 286.

Some of the state courts, in their decisions upon the subject of wagers, go so far as to hold that wagers upon the result of a horse-race are legal, and may be collected by action at law: *Grayson v. Whatley*, 15 La. Ann. 525; *Dunman v. Strother*, 1 Tex. 89; *McElroy v. Carmichael*, 6 Id. 454; *Kirkland v. Randon*, 8 Id. 10; *Barret v. Hampton*, 2 Brev. 226. See also, *Ross v. Green*, 4 Harr. 308; *Wheeler v. Friend*, 22 Tex. 683.

The contrary view has, however, been taken in other states, and in many of the states statutes have been enacted for the purpose of controlling or prohibiting both racing and wagers. See *Wilkinson v. Tousley*, 16 Minn. 299; *Hasket v. Wootan*, 1 Nott & McC. 180; *Gibbons v. Gouverneur*, 1 Den. 170; *Van Valkenburg v. Torrey*, 7 Cowen 252; *Lewis v. Littlefield*, 15 Me. 233; *Ellis v. Beale*, 18 Id. 337; *Watson v. State*, 3 Ind. 123; *Myers v. State*, 3 Sneed 98; *Huff v. State*, 2 Swan 279; *State v. Posey*, 1 Humph. 384; *State v. Blackburn*, 2

Cold. 235; *McLain v. Huffman*, 30 Ark. 428; *McKean v. Caherty*, 1 Hall 300; *Bledsoe v. Thompson*, 6 Rich. Law 44.

Gaming is, in many of the states, prohibited by statutes more or less stringent in their character, and the question arises whether a horse-race is a game within the meaning of these statutes; and upon this question the cases will not be found to be entirely harmonious.

In the *State v. Smith*, Meigs 99, the Supreme Court of Tennessee defined gaming to be "any contest or cause of action, commenced or prosecuted in consequence of a bet or wager, or with a view to determine the bet or wager, upon the event of such contest or action." See also, *Harrison v. The State*, 4 Cold. 195, where running a horse-race on a public road, when there was no bet or wager, although made substantive offence by statute, was not considered gaming. See also, *Bish. on Stat. Crimes*, § 857; *Tatman v. Strader*, 23 Ill. 493, as to the meaning of the word, "gaming."

Where "games of chance," "gambing devices," "games of hazard or skill," &c., are prohibited by statute, horse-racing, if not specified in the statute, has been held not to be prohibited by the use of such terms; *Harless v. United States*, 1 Morris 169; *State v. Hayden*, 31 Mo. 35; *State v. Rorie*, 23 Ark. 726; *Commonwealth v. Shelton*, 8 Gratt. 592. See also *Bish. Stat. Crimes*, §§ 862, 872, 873.

In *Harless v. United States*, *supra*,

which was an indictment for betting on the result of a horse-race, it was held that horse-racing was not a game of chance.

In *State v. Hayden, supra*, which was an indictment for betting "upon a certain gambling device commonly called a horse-race," it was held that a horse-race was not a gambling device, within the meaning of the statute, and that *Shropshire v. Glascock*, 4 Mo. 536, below referred to, was not applicable. See also *McElroy v. Carmichael, supra*, to the same effect.

In *State v. Rorie, supra*, Rorie and others were indicted for betting at a "certain game of hazard commonly called a horse-race," and the court were of the opinion that horse-racing was neither a "game of hazard or skill," within the meaning of the statute prohibiting such games "played," &c., however vicious betting at such sports might be.

In *Shelton's Case, supra*, the defendant was indicted for betting on a horse-race, under a statute providing that "any free person who at any ordinary, race-field or public place, shall play at any game whatever, except bowls, chess, backgammon, draughts, or any licensed game, or bet on the hands or sides of others who do play, shall be punished," &c.; and it was held that a horse-race was not playing at a game, so that betting upon the race was a betting on the hands or sides of others who do play.

Most of the decisions above cited seem to have been influenced by the peculiar expressions contained in the statutes which they construe, and seem to be opposed by other equally well-considered cases.

Horse-racing and foot-racing were held to be embraced within the statute of 9 Anne, c. 14, "for the better preventing excessive and deceitful gaming."

In *Blaxton v. Pye*, 2 Wils. 309, which was an action upon a wager upon a

horse-race, the court said "they ought to extend the statute of 9 Anne to prevent excessive betting upon all sports as well as games; and that although horse-racing is not mentioned in that statute, yet it is within the general words *other game or games*, as in the case of *Goodburn v. Marley*, 2 Stra. 1159." But as observed by ENGLISH, C. J., in *State v. Rorie, supra*, it seems that the statute of 9 Anne was construed in connection with the preceding statute of 16 Car. 2, c. 7, in which horse-racing, foot-racing, &c., were expressly mentioned (see, also, *Lynall v. Longbotham*, 2 Wils. 36, followed by *Brown v. Berkeley*, Cowp. 281); so that the authority of these cases may not perhaps be considered conclusive upon the question. With reference to this point, however, CARON, C. J., in *Tatman v. Strader*, 23 Ills. 493, says that "a careful consideration of those decisions will show that this [the point that the two statutes were construed together] is thrown in rather as a make-weight in the argument than as the basis of the decisions, and those cases were so decided because the 9 Anne makes all bets upon games void;" and he cites *Clayton v. Jennings*, 2 W. Black. 706, as overthrowing the argument. Certain it is, that with the exception of the case of *State v. Rorie, supra*, the English cases above cited seem in all the American cases considering this question to be regarded as authority for the proposition that horse-races are games irrespective of the statute of 16 Car. 2, c. 7.

In *Shropshire v. Glascock*, 4 Mo. 536 it was held, citing *Lyndell v. Longbotham*, and *Goodburn v. Marley, supra*, that horse-racing was a game within the meaning of Rev. Laws of 1825, 409, (which is copied after the stat. of 9 Anne), enacting "that all promises, notes, bills, bonds, &c., made or entered into by any person, where the whole or any part of the consideration thereof, shall be money, &c., won by

gaming, or playing at cards, dice, or any game or games, shall be void and of no effect." The action in this case was upon a bond given to secure a forfeiture in case either party should refuse to run the race. *Shropshire v. Glascock*, was followed by *Boynnton v. Curle*, 4 Mo. 599, which involved precisely the same point, the note sued on being given as a forfeiture.

In *Ellis v. Beale*, 18 Me. 337, which was an action to recover back money lost at gaming, being a wager of \$50 on the result of a trial of speed of plaintiff's and defendant's horses, it was held that horse-racing or horse-trotting was a game within the statute of 1821, c. 18, "to prevent gaming for money or other property," and that money lost by betting upon the speed of horses in a trotting-match might be recovered back. Cards and dice were expressly named in this statute, but not horse or foot-races. The words "any other game" were, however, considered sufficiently broad to embrace horse-racing, which the court considered within all the mischiefs which render gaming unlawful. To the same effect, see *Tutman v. Strader*, 23 Ill. 493, a decision upon the Illinois statute, which is a substantial copy of 9 Anne, c. 14, s. 1. See also, *Moshier v. Griffin*, 51 Ill. 184.

In *Cheesum v. State*, 8 Blackf. 332, a horse-race was held to be a game within sect. 42, p. 993, R. S. 1843, which provides that "any person legally called to give evidence against another for gaming shall be deemed a competent witness to prove such gaming, although such person may have been concerned as a party; and may be compelled to testify as in the case of other witnesses."

In *Wade v. Deming*, 9 Ind. 35, which was an action to recover money bet and lost on a horse-race, it was held that betting on a horse-race was betting on a game within the meaning of sect. 2, R. S., p. 305, which enacted that money

lost by betting on any game, &c., may, within six months next following, be recovered by suit, &c. STUART, J., in this case, said: "The principal point in this case turns on the word 'game' as used in the statute. It is insisted that a horse-race is not a game within the meaning of that act: 1 R. S., *supra*. The idea of a 'game of horse-race' is ridiculed, without a just appreciation, perhaps, of the purpose of all such enactments. It seems obvious that the same vicious principle runs through all bets, whether they be upon a horse-race, or upon cards, or any other undetermined event. It is not the race or the play that the legislature is aiming at, but the betting for money or other valuables. In 3 Stark. 1, ABBOTT, C. J., says, games, whether of skill or of chance, are within the English statutes, and that it is the playing for money which makes them unlawful. If feats of skill are games within the statute, feats of strength or of speed must be equally games within the same statute. Aside from the awkward phraseology, and regarded on principle only, it is not easy to distinguish a game of horse-race from a game of cards, or a bet on the one from a bet on the other. Both are clearly within the same mischief."

Notwithstanding nearly all the above cases cite as authority, or follow cases which do cite as authority, for the rule therein adopted, some one or more of the above-cited English cases, it is believed that by the weight of American authority, where "gaming" simply is prohibited by the statute, and where the decision is not influenced by peculiar expressions used in the statute indicating a contrary intent, a horse-race is a game, within the meaning of the statutes upon this subject.

A bet or wager, however, as already stated, seems to constitute an essential element of gaming, and a distinction may properly be taken between a wager upon the result of a horse-race, and a

premium offered by an association or individual, as in the principal case, for the purpose of increasing the speed of horses, which is a lawful object. The purpose of the association being lawful, the fact that third parties bet upon the result of the race can not, as it seems, change the result, when the association offering the prize is not privy to such betting. See *Cain v. McHarry*, 2 Bush 263, where ROBERTSON, J., says that although a race-course is chartered for the expressed purpose of racing, yet, while it thus encourages racing, it does not legalize betting, which is not necessary for the effectuation of its purpose and is forbidden by the general law.

The case of *Alvord v. Smith*, referred to by the court in the principal case, and which will be found in 7 Reporter 396, was an action by the appellee against the appellants to recover a premium offered by them as the Indianapolis Trotting Association, to the owner of the horse that should make the second best time in a trotting-match on the appellant's track. BIDDLE, J., delivering the opinion of the court said: "Nor do the facts alleged show a wager or bet. There is a clear distinction between a wager or a bet, and a premium or reward. In a wager or a bet there must be two parties, and it is known before the chance or uncertain event upon which it is laid, is accomplished, who the parties are which must either

lose or win. In a premium or reward, there is but one party until the act or thing or purpose for which it is offered has been accomplished. A premium is a reward or recompense for some act done; a wager is a stake upon an uncertain event; in a premium it is known who is to give before the event; in a wager it is not known till after the event. The two need not be confounded. Nor can we see anything unlawful or against public policy in such a case. Under our statutes (1 R. S. 1876, 48) encouraging agriculture and authorizing public fairs, premiums are offered for the best draught-horse, trotting-horse, &c. These premiums certainly are not wagers. As well might an insurance policy be called a wager, because it is to be paid on an uncertain event, as to call a premium a wager, because we do not know who will be entitled to it, until the event happens. We can see no difference in principle between a premium offered by an authorized corporation and one offered by a partnership. Neither are wagers, nor are they unlawful."

The case of *Alvord v. Smith*, and the principal case, are the only two cases that have come to the writer's notice upon the questions directly involved in those cases, and being clearly correct in principle will, it is believed, settle the law upon the point involved.

MARSHALL D. EWELL.

Chicago, July 28th 1879.

United States Circuit Court, Eastern District of Missouri.

WILLIAM R. GAUSE v. CITY OF CLARKSVILLE.

Whether a municipal corporation possesses the power to borrow money and to issue negotiable securities therefor, depends upon the construction of its charter and the legislation of the state applicable to it.

It has no incidental or inherent authority under the usual grants of municipal powers as a means of discharging its ordinary municipal functions. Such authority may be inferred from special and extraordinary powers, which require the expenditure of unusual sums of money, when it is usual to execute such powers

by means of borrowing, and when upon the whole legislation applicable to the municipality such appears to have been the legislative intent.

These principles applied, and coupon bonds to borrow money to erect and repair wharves and to open streets, issued under the general grants of municipal power in the charter, were held not to be binding upon the city, while other bonds, issued under a special act of the legislature, in payment of stock in companies organized to construct macadamized roads from the city, were held to be valid.

Where bonds of a city are issued without authority for money borrowed and actually received by the city, the remedy against the city is not by an action on the bonds, but to recover the money.

THIS was an action by the holder of certain bonds issued by the defendant city. The defendant demurred to the petition.

Dryden & Dryden and Enoch Pepper, for plaintiff.

Wagner, Dyer & Emmons, for defendant.

The opinion of the court was delivered by

DILLON, Circuit Judge.—Three classes of bonds are in question, headed and styled respectively, "Wharf Improvement Bonds," "Street Improvement Bonds" and "Road Improvement Bonds." The two first stand on the same, the last on a different ground. The former will be first considered. The bonds purport to be unconditional obligations of the city, and are negotiable in form. They do not recite the purpose for which they were issued: this purpose only appears, if at all, from the heading.

The charter of the city (sect. 13) gives the city council power "to erect, repair and regulate wharves" and "to open, clear, regulate, graduate or improve the streets of the city." Section 1 creates the city a corporation, and provides that it shall have power to contract, and to sue and be sued, &c., and "may grant, lease, purchase, receive and hold property, real, personal and mixed, and may do all other acts as natural persons; and may have a common seal and alter and break the same at pleasure."

Sect. 12 gives to the council general power to levy taxes on property in the city, but limits such taxes to a rate of one-fourth of one per cent.

As to the "wharf improvement bonds," the petition alleges that they were made "for money borrowed by defendant for the purpose of erecting and repairing wharves in the corporate limits of its city, and for otherwise improving said city." These bonds are respectively for \$2000 and \$1000—together \$3000.

As to the "street improvement bonds," it is alleged in the petition that they were executed "for money borrowed by defendant for the purpose of opening, clearing, graduating, paving and improving divers streets and alleys in said city, and of otherwise improving said city." These bonds are respectively for \$1000, \$1000, \$1500, \$400, \$400, \$200, \$1000 and \$500: total, \$6000.

The demurrer to the petition upon the foregoing classes of bonds is upon the ground that the defendant had no power to borrow money for the purposes alleged, or to execute the bonds. The questions to be decided are, therefore, two: 1. Had the city power to borrow money for the purposes alleged? 2. If so, whether it had the power to execute negotiable bonds therefor?

The charter contains no express power to do either, unless it is conferred by the clause in section one above quoted, that the city "may do all other acts as natural persons." This general language must necessarily be restrained to such other acts as are authorized by its charter, or the statutes of the state applicable to the city, if any, and cannot be construed to remove all the limitations inseparable from corporate existence, and to confer upon the city authority to engage in business of a private nature, or to make its powers commensurate with those of natural persons. It is not, therefore, an express power to borrow money, or to issue commercial paper. No such powers are in terms conferred. If they exist, they exist as incidental to the express powers to erect and repair wharves, and to open and improve streets, and not otherwise.

As the power to borrow money and the power to issue negotiable paper are, though closely related, not identical, they will be to some extent separately considered. And first, as to the power to borrow money. As the case stands, it is to be taken that the money evidenced by the bonds now under consideration, was borrowed in advance of any debt incurred in respect of the wharves or streets, and as a means of raising by their sale in the market a fund to pay for contemplated improvements of that character. The general question as to the implied power of municipal corporations to borrow money and to execute negotiable securities therefor, has been recently much examined. The American cases on the subject are conflicting, and it is impossible to harmonize them. A careful examination of them, however, has left us with the conviction that the questions here involved are not only open to discussion, but

remain yet to be judicially settled. The unsettled state of the law, concurring with the great importance of the question, has induced us to examine it with care, and must be our justification for discussing the subject with more than ordinary fulness.

The following cases favor the existence of the incidental powers here in question: *Bank v. Chillicothe*, 7 Ohio, part 2, p. 21 (1836); *Mills v. Gleason*, 11 Wis. 470 (1860); *Williamsport v. Commonwealth*, 84 Penn. St. 487—three judges dissenting; *Clarke v. School District*, 3 R. I. 169; *Sheffield Township v. Address*, 56 Ind. 157. And see cases collected in notes to sects. 82, 407, Dillon on Munic. Corp.

The following cases are opposed to the existence of such powers: *Hackettstown v. Swackhamer*, 37 N. J. Law 191; *Knapp v. Hoboken*, Id. 394; *Beaman v. Leake Co.* (power of counties), 43 Miss. 237; *Police Jury v. Britton* (power of counties), 15 Wall. 566, 572; opinion of BRADLEY, J., in *Nashville v. Ray*, 19 Id. 468.

It is not proposed to examine and review these cases separately. In the existing uncertainty of the law on this subject, it is better, perhaps, to discuss the questions upon principle, rather than to risk our judgment respecting them upon one class of the conflicting decisions.

Corporations in this country can exist only by virtue of legislative enactment, and it necessarily follows that whether they possess the power to borrow money or to make negotiable paper, depends upon a true construction of their charters and the legislation applicable to them. This is true of all corporations, private as well as municipal.

An examination of the judicial judgments in England and in this country shows considerable diversity of opinion between the English and American courts, as to the extent of the implied powers of corporations. The English courts have at all times wisely set a strong face against an elastic construction of corporate charters; the American courts have too often favored the existence of constructive powers.

In England, if a private corporation wishes power to borrow money, the power and the purposes for which, and the conditions on which it may be exercised, are expressed in the charter or constituent acts, or in the memorandum and articles of association; and the power is not held to exist unless the charter or articles of

association confer it, or unless the nature of the business for which the corporation is chartered or organized raises a necessary or reasonable implication of its existence.

But in this country it must be admitted that the courts have held, quite without exception, that all corporations for pecuniary profit, unless specially restrained, may not only borrow money, but issue negotiable paper for any corporate debt. Dillon's Munic. Corp., sects. 82, 407, and cases cited in notes; *Lucas v. Pitney*, 3 Dutch. (N. J.) 221; *Hackettstown v. Swackhamer*, 37 N. J. Law 191; per BEASLEY, C. J.

The originals of our municipal institutions are derived from England, and it is the unquestionable law of that country that municipal corporations have no power to borrow money unless conferred by statute. *Regina v. Litchfield*, 4 Ad. & Ellis (N. S.) 891, 906. In the case just cited, it was held that there could be no recovery upon the note of the corporation given for money borrowed and used to pay the debts of the corporation. PATTESON, J., without saying that the lender was absolutely remediless in any form of action or suit, did say that he had no remedy upon the note, because this is "not a trading corporation." In this country municipal corporations are, by statute, invested with certain defined powers, and they are almost wholly dependent upon revenues derived from the authority given to levy taxes for the means of executing their municipal functions.

In the case before us, the defendant city had, *inter alia*, the usual power to erect and repair wharves and to improve streets, and to make contracts and to incur debts therefor. It had the power to levy taxes to raise the means to pay debts thus created. The amount of taxes authorized to be laid in any one year was limited. It is entirely practicable for the city to execute its ordinary municipal powers and discharge its ordinary municipal duties without resorting to borrowing money. If in erecting wharves or improving streets it incurs a general debt, it seems to us plainly to have been the intention of the legislature, as shown by the charter, that it should be paid out of its ordinary revenue. It is not necessary to resort to the perilous expedient of borrowing money in advance, which may be lost, embezzled or misappropriated: much less to borrow it on a long credit, which inevitably leads to abuse and extravagance, and issue therefor, as the means of obtaining it, its negotiable securities. There is an obvious and essential differ-

ence in incurring a debt to be paid in the usual manner out of the ordinary revenues of the corporation derived from taxation, and the raising of money in advance by a pledge of credit and the issue of coupon bonds payable at a long distant day, for sale in the money markets of the country.

What are the consequences of holding that there is, under these circumstances, an implied power to borrow money in this manner and for this purpose? The temptation to extravagance and the danger of loss have been already mentioned, and the history of the workings of our municipal institutions shows that this temptation always operates to their injury, and that burdensome debts and oppressive taxation are its natural and almost inevitable results.

But this is not all. Legal consequences of a serious nature follow from the doctrine that there is an incidental power to borrow money to execute the ordinary powers of the municipality. If the power thus to borrow exists, it is without legal limits. Its only possible limit is the credit of the corporation—the amount of bonds its officers can sell. Nor is this all. If the power to borrow money exists, then, under the view of the courts, as almost universally held in this country, the power to borrow implies the further power to give, like any other borrower, a note, bill or bond, negotiable in form and effect for the sum borrowed; the time of payment and the discount to be such as may be agreed upon between the corporation and the proposed lender. The bonds may, as in the recent case of the the city of Williamsport, be issued for an enormous amount, and be sold, as in that instance, for 67 per cent. of their par value, or even less, and the corporation is bound: *Williamsport v. Commonwealth*, 84 Penna. St. 487.

Nor is this all. The Supreme Court of the United States has firmly established the doctrine by a long series of well-known decisions upon municipal bonds, "That when a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has the right to presume that they were issued under the circumstances which gave the requisite authority, and they are no more to be impeached in the hands of such a holder than any other commercial paper:" *Lexington v. Butler*, 14 Wall. 282.

Such are the mischievous and alarming consequences of the unsound doctrine, that a municipality has, by virtue of its ordinary powers and merely as a means of executing its ordinary duties, the power to pledge its credit by the issue and sale of its commercial

obligations. It is not the law. No such doctrine can permanently stand. Although it has taken, as yet, no deep root in our jurisprudence, it has nevertheless attained sufficient development to show its noxious character. The general, and, until a period comparatively recent, the universal practice of municipalities not to issue, without express legislative authority, bonds or commercial obligations as a means of raising loans, demonstrates the non-existence of an implied power to do this by demonstrating that no such power is necessary to enable a municipality to execute its usual powers and to discharge its ordinary duties.

We are required in this case only to determine the inherent or incidental power of the city to raise loans by a sale of its negotiable securities payable at a distant day. We deny any such power. Whether all borrowing to meet debts actually incurred, under an arrangement which contemplates repayment out of the regular revenue, and for which a mere voucher or certificate of indebtedness is issued is *ultra vires*, unless the authority is expressly given, we need not now decide. What we decide on this point is, that the power to erect wharves and to improve streets, conferred by the defendant's charter, does not carry with it the power to raise funds for this purpose by the issue and sale of negotiable securities, like those here in suit.

Whatever doubt may be considered to exist as to the implied right to borrow, the want of authority in a municipal corporation as merely incidental to its usual municipal powers to issue negotiable securities, which shall be invested with all the attributes of commercial paper, seems, on reason and principle, to be plain. Commercial paper had its origin in the conveniences or necessities of trade among merchants. Originally, only merchants made such paper; afterwards the making of it was extended to all persons acting in their individual capacity. It extends to trading, commercial and other partnerships, but if the partnership is not a trading partnership, "the question," says Mr. Lindley, "whether one partner has implied authority to bind his copartners by putting the name of the firm to a negotiable instrument, depends upon whether the business of the partnership is such that dealings in negotiable instruments are necessary for its transaction, or are usual in partnerships of the same description:" 1 Lindley on Part., Eng. ed., 213, 214.

As to the power of corporations to issue commercial paper, the law of England is settled. In England no corporation, whether

municipal (*Regina v. Litchfield*, 4 Ad. & E. 891, 906), or private (*Bateman v. Mid-Wales Railway Co.*, Law Rep. 1 C. P. 499, 1866), has the incidental right to make commercial paper, except the Bank of England, which was incorporated for the very purpose, and trading corporations strictly, such as the East India Company.

We state the foregoing propositions after a careful examination of the English books. Accordingly, it is laid down by Mr. Justice BYLES, in his work on Bills, that "without special authority, expressed or implied, a corporation has no power to make, endorse or accept bills or notes." Byles on Bills, 8th Eng. ed., 62. Thus a water-works company (*Broughton v. Manchester Water-works*, 3 B. & Ald. 1), a gas joint-stock company (*Brahma v. Roberts*, 3 Bing. N. C. 963), or even trading companies, unless such a power essential to the purposes for which they are formed (*Bateman v. Railway Co.*, *supra*), have no general or implied authority to make commercial paper. In *Bateman's case*, just cited, the question for the first time arose in England, as late as 1866, as to the right of a railway company, with an authorized capital of 170,000*l.*, to make or accept bills of exchange, and it was unanimously decided by judges of great eminence (ERLE, C. J., BYLES, KEATING and MONTAGUE SMITH, JJ.), that the company had no such power. The acceptance was under seal, and it is a mistake to suppose that the decision rested on the technical ground that a corporation can only contract under seal. It was placed upon the broad ground that there was no Act of Parliament, general or special, which conferred the power. It was admitted by all the judges that the railway company might incur debts in the construction or operation of the road; "but it is one thing," says KEATING, J., "to say that they shall be liable to be sued for goods sold and delivered or for work done, and an entirely different thing to say that they may accept bills in payment." And to the same effect was the opinion of the other judges.

The principle of this case was approved in *The Peruvian, &c., Railway Co. v. Thames, &c., Ins. Co.*, Law Rep. 2 Ch. App. 617, where a general incidental power to issue bills of exchange and negotiable instruments under the Companies' Act of 1862 was denied, and the power held to depend upon the proper construction of the memorandum and articles of association. The companies organized under that act may communicate this power to their

directors, but it must be given expressly or by fair intendment in the memorandum and articles of association of the company or it will not exist.

We are aware that the American courts, as to private corporations organized for pecuniary profit, have very generally held a different doctrine and affirmed their implied or incidental power to make commercial paper: *Dillon Munic. Corp.*, sects. 81, 82, 407, and cases cited. But the powers of private corporations in this regard are not here material.

The American judgments which have affirmed the like power in municipal corporations have done so upon this course of reasoning. The corporation, they argue, has power to contract a debt, and it is assumed to be incident to that power to give a note or bill or bond in payment of it. Thus in *Kelly v. Brooklyn*, 4 Hill (N. Y.) 263, COWEN, J., makes the basis of the judgment the erroneous proposition that independent of any statute provision all corporations, private and municipal, may issue negotiable paper for a debt contracted in the course of its business; and other courts have without examination adopted this mistaken view of the law: *Galena v. Corinth*, 48 Ill. 423; *Clarke School Dist.*, 3 R. I. 199; *Sheffield v. Andress*, 56 Ind. 157; *Tucker v. Raleigh*, 75 N. C. 267; *Ketchum v. Buffalo*, 14 N. Y. 356; *Douglas v. Virginia City*, 5 Nev. 147; *Sturtevant v. Alton*, 3 McLean 393.

It sufficiently appears from the foregoing that it is a mistake to affirm that the power to issue negotiable paper necessarily or legally results from the corporate power to create debts.

In England, as shown by *Bateman's case*, *supra*, it is held that inasmuch as the corporation has no power to accept bills it cannot be made liable on its acceptance, though the bill was drawn for a valid and binding debt.

On this point ERLE, C. J., says: "The bill of exchange is a cause of action, a contract by itself, which binds the acceptor in the hands of an endorsee for value; and I conceive it would be altogether contrary to the principles of the law which regulates such instruments that they should be valid or not, according as the consideration between the original parties was good or bad, or whether in the case of a corporation, the consideration in respect of which the acceptance is given is sufficiently connected with the purpose for which the acceptors are incorporated. It would be inconvenient to the last decree if such an inquiry could be gone

into. Some bills might be given for a consideration which was valid, as for work done for the company, and others as a security for money obtained on loan beyond their borrowing powers. It would be a pernicious thing to hold that, in respect of the former, the corporation might be sued by an endorsee, but in respect of the latter not."

Whether we consider the question in the light of the nature and objects of the ordinary grants of municipal power, or in the light of the purposes which led to the invention and which sustain the use of negotiable paper with the qualities attributed to it by the law merchant, we are alike led to the conclusion that the mere power to create a municipal liability for ordinary municipal purposes does not carry with it as an incident the authority to raise loans by the issue and sale of commercial obligations. The implied power to issue vouchers or evidences of indebtedness for authorized and valid municipal debts undoubtedly exists, and it may be true that such vouchers or evidences of indebtedness, though put in the form of negotiable paper, are not for that reason void, but if not void it is clear that they derive no additional force from that circumstance.

The only safe as well as sound doctrine is, that there is no power in a municipal corporation, as incidental to the execution of its ordinary duties, to invest its vouchers or notes or bonds with the character of commercial paper. By statute or usage they may be transferable, but the transferee always takes instruments thus issued whatever their form, *cum onere*. We are not now referring to municipal bonds negotiable in form issued by express legislative authority; these possess, according to the settled law of this country, all of the incidents of commercial paper.

We have looked closely into the American cases against municipal and public corporations, which hold that it is incidental to the power to create a debt to give a note or bond in payment of it, but we have found no judgment which holds that the note or bond thus issued partakes of that quality of commercial paper which protects an innocent holder for value from defences or equities to which it would be subject in the hands of the payee. What we wish distinctly to hold is that this supreme and dangerous attribute of commercial paper cannot be imparted to the issues of municipal obligations, whatever their form, unless the power to do so is plainly conferred, either expressly or by implication by the legislature;

and that no such implication exists in respect to debts or liabilities arising from the discharge of ordinary municipal duties.

The argument against the general implied power in municipalities to issue commercial paper with all of the incidents of negotiability may be briefly summarized as follows:

For hundreds of years the original of our municipal corporations have existed in England, without it ever being contended or held that they could, without express authority from Parliament, issue such paper. On the contrary, it is there alike conceded and decided that such authority is necessary as the basis of the power. And such has been the view always practised upon in this country, from the earliest period until a very recent date. The soundness of this view is strengthened by the almost invariable practice of the legislature to confer, when it is deemed expedient, upon municipal and public corporations, in express terms, the power to borrow money and issue bonds or negotiable securities therefor.

It is a *non sequitur*, as applied to municipal and public corporations, to affirm that this power to create debts implies the power to give a negotiable bill, bond or note therefor, which shall be invested with all the incidents of negotiability. Such an implied power is denied in England even as to private corporations organized for pecuniary profit (other than banking or trading corporations), and this demonstrates that the alleged implication of such a power in municipal corporations is neither logically nor legally sound. But if it be conceded that, as respects private corporations, the American doctrine is otherwise, and that it is rightly so, still it does not follow that the same rule does apply or ought to apply to municipal corporations. They are not created for trading, commercial or business purposes. Private corporations are more vigilant of their interests than it is possible for municipal corporations to be. The latter are in their nature governmental agencies, having in general but one resource with which to meet their liabilities, and that is by taxation, and it is upon this resource that creditors must be taken to rely. The frauds such a doctrine will enable unscrupulous officers successfully to practice ought to weigh with decisive force against its unnecessary judicial entertainment.

It is a power without assignable limits, intrinsically dangerous, and one which will not fail to prove baneful in the last degree. Courts, when called upon to establish a new doctrine, ought to consider not only its nature, but its consequence, and cannot properly

disregard the lessons of experience. A judge may well tremble when he contemplates in the light of recent experience the disasters which such a doctrine will bring upon our municipalities when it shall become generally known that such a tremendous power to Schuylerize them is lodged in the hands of their temporary officers.

Sound policy and sound legal principles are generally coincident, and so it is here. If the power to issue negotiable paper is needful or expedient for our municipalities, let it be given by the legislature, that can prescribe the limits, purposes and conditions of its exercise, and provide for the payment of the liabilities which are thus authorized. And, finally, the argument against the existence of a general implied power in municipalities to issue commercial paper becomes, as it seems to us, absolutely conclusive, in view of the rule, wisely settled, that corporate powers, especially powers whose exercise look to the creation of public burdens, are to be strictly construed, and that however convenient at times such a power might be, it is one which is not necessary (as shown by universal experience and practice in England, and generally in this country) to enable the corporation to exercise its ordinary functions, or to carry into effect the purposes for which it was created. It is, therefore, a power which does not exist.

Our justification for this extended discussion is found in the fact that the doctrine here combatted is struggling for admission into our jurisprudence. It is one which, as we conceive, is founded in a radical misconception of sound legal principles, and one, moreover, whose consequences, if it shall be incorporated into the general law, cannot be contemplated without anxiety.

It follows that since the defendant city had no power to borrow money in the manner attempted, to erect the wharf or to improve the streets, the bonds issued therefor are not legally binding upon it, and there can be no recovery upon them: *Bateman v. Mid-Wales Railway Co.*, *supra*; *Thomas v. Port Hudson*, 27 Mich. 320; *Hackettstown v. Swackhamer*, 37 N. J. Law 191; *Regina v. Litchfield*, 4 Ad. & E. 891, 906; *Mayor, &c., v. Ray*, 19 Wall. 468, 440, per BRADLEY, J.

It will not validate these bonds so as to make them the basis of a recovery, even if it be shown that the money borrowed was in each instance used for the purpose for which it recited in the bonds to have been borrowed. But the plaintiff may amend and add, in respect of these bonds, counts in the nature of counts for money

had and received. Adhering to the decision of this court, *TREAT, J.*, in *Wood v. Louisiana*, at the last term, the present holder of the bonds will then be treated as the assignee of the original holder or payee in respect of the money actually lent to the city; and if, after the city obtained it, the same was in fact expended for the erection and repair of wharves, or the improvement of streets, or possibly, if expended for other authorized municipal purposes under the authority of the city council, the amount advanced, with lawful interest, less payments received on account thereof, may be recovered: *Dillon Munic. Corp.*, sect. 730; *Paul v. Kenosha*, 22 Wis. 266; *Shirk v. Pulaski County*, 4 Dillon 208; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Mayor, &c., v. Ray*, 19 Wall. 468, 484, per HUNT, J.

The case might be different, even in this aspect of it, if the contract was one expressly prohibited by statute; but this is a question not unattended with difficulties which it is not necessary to consider.

II. The other class of bonds, known as "road improvement bonds," were issued in renewal of bonds issued by the city in payment for stock subscribed to certain companies organized to build gravel roads from the defendant city to points in Missouri. Subscriptions to the stock of such companies were expressly authorized by the Act of the Legislature of February 24th 1877 (Acts 1857, p. 302), quoted at large in the statement of the case.

Under the true construction of this act, in view of the general legislation of the state of Missouri at this period, on the subject of municipal aid to railway and other companies; the almost universal practice under such legislation to issue bonds for debts of this kind; the practical construction put upon this act by the city; the special nature of the authority given; the limited amount of tax authorized by the charter to be laid for the ordinary uses of the municipality, and the decisions of the Supreme Court of the United States as to the implication of the power to issue bonds to pay for stock subscriptions in railways, and the general tenor of the judgments of the Supreme Court of the United States on the subject (*Lynde v. Winnebago Co.*, 16 Wall. 6, 12; *Police Jury v. Britton*, 15 Wall. p. 572; *Dillon Munic. Corp.*, sects. 106, 107, 407, and notes); and that the inference of the power to issue bonds is in no way inconsistent with the provisions of the act, my judgment is that the city was authorized to issue bonds in payment for the stock subscribed in those companies; that it would be liable to a general

judgment on such bonds, and that on those bonds falling due, they might be renewed by other bonds.

The demurrer to counts one to ten of the petition is sustained, to counts twelve to seventeen overruled, with leave to amend, if the plaintiff is so advised. Judgment accordingly.

TREAT, J., dissented as to the last class of bonds mentioned,—holding them equally invalid with the first.

Court of Appeals of Kentucky.

ED. S. ROBINSON v. ARIEL HOSKINS.

If an infant buys a chattel and keeps it until he comes of age, and then converts it to his own use, that is a ratification of the purchase which makes him liable for the price.

A sale of the chattel after becoming of age is a ratification within this rule.

Such ratification does away with the necessity of any written promise to pay the debt.

THIS was an action for the price of a horse purchased by appellee of appellant in 1875, when appellee was under twenty-one years of age. He arrived at that age, and sold the horse for \$60, for which he took the note of the purchaser. Appellee relied on two defences: fraud in selling an unsound for a sound horse, and infancy at the time of the purchase.

The opinion of the court was delivered by

ELLIOTT, J.—If the defence of fraud had been established, the appellee would have been entitled to have the damage which resulted therefrom deducted from the price of the horse.

If the plea of infancy were sustained, that defence was a bar to the action, unless the appellee converted the horse or kept it and used it as his own property after he arrived at age.

In Tyler on Infancy and Coverture 82, it is asserted that “where an infant purchased a horse, and gave his note for the purchase-money, and kept the horse until after he was of age, and then sold him, this was regarded as a ratification of the purchase, and the infant was held liable on his note. So, if an infant buy goods on credit, and has them in his possession, and uses them, and does not return them to the vendor within a reasonable time after he comes of age, it has been held that he thereby ratifies the purchase, and becomes liable for the price of the goods. So, where an infant

purchased a yoke of oxen, for which he gave his negotiable promissory note. After he became of age he disposed of the oxen and received the avails. This was held a ratification of the purchase, and the infant was made liable to pay his note.

It is true that the plaintiff cannot sue upon the defendant's promise, made after he was of age, to pay the debt incurred during infancy, unless such promise is evidenced by a writing, but if the purchase is made during infancy, and the thing purchased has been kept and used by the infant till his arrival at age, and then converted to his own use, such conduct amounts to an election by the adult to stand by the contract made whilst he was an infant.

The reasoning upon which this doctrine rests is that the contract of the infant is not void, like that of a *feme covert*, but is only voidable, and having used, sold and converted, after his arrival at age, the property purchased during his infancy, he has, in contemplation of law, elected, when an adult, to keep the property at the price and on the terms agreed on when he was an infant.

The evidence in this case conduces to prove that after his purchase of the horse the appellee sold it, and took the purchaser's promissory note for \$60, as the purchase price, which note was still in the appellee's possession and unpaid in October 1877, and these facts were substantially set up in plaintiff's reply, to which a demurrer was sustained. The reply alleged that the appellee became of age in January 1876, and sold and converted the horse by receiving the purchaser's promissory note for it.

If, after his arrival at age, the appellee sold and converted the horse, his conduct amounted to a confirmation of the original agreement, and needed no written promise to support it, and, therefore, the court erred in sustaining appellee's demurrer to appellant's reply.

Wherefore the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

Supreme Court of Tennessee.

JAMES RIVES ET AL. v. N. L. THOMAS ET AL.

A person who endorses a past due note at the request of the maker, pursuant to a contract with the payee for further indulgence, is liable as guarantor.

THIS was a bill filed to hold the defendant liable as surety or guarantor of the payment of a note, and to subject to the satisfac-

tion of the same certain property conveyed by him to his son without consideration.

The following facts appeared: On 14th February 1859, the defendant, J. J. Thomas, executed his note under seal to the testator of the complainants, payable one day after date. On February 1871, one of the complainants called upon the said Thomas for payment of the note, when the latter proposed if complainants would wait upon him to give his brother, the defendant, N. L. Thomas, as security upon the note. They therefore went together to the residence of N. L. Thomas, and the said N. L. Thomas, at the request of J. J. Thomas, wrote his name on the back of the note.

The opinion of the court was delivered by

COOPER, J.—The testimony leaves no doubt that the object of the visit of complainant and J. J. Thomas to the defendant, the obtaining of additional security on the note in consideration of forbearance of suit, was explained by the debtor to his brother before the signature of the latter was endorsed, and that the endorsing brother knew he was assuming and intended thereby to assume whatever responsibility the act created. The complainant did forbear to sue for about a year, the maker of the note in the meantime becoming insolvent. No demand of payment of the note was made of the maker subsequent to the endorsement, nor, of course, was any notice of non-payment given to the defendant, N. L. Thomas. The words, "I guarantee the payment of the within note," was afterwards written at the instance of the complainants, and by their counsel over his name as endorsed.

It is not denied that an agreement to forbear suit for an indefinite time, which would mean a reasonable time, or an actual forbearance, would constitute a sufficient consideration to sustain a promise to guarantee the payment of a note: *Tappan v. Campbell*, 9 Yerg. 436; *Johnson v. Wilmouth*, 13 Met. 416; *Story's Prom. Notes*, § 186. And the evidence shows due diligence by the complainants to collect their debt from the maker, and that the latter became insolvent before the expiration of the reasonable time of forbearance, if these facts are at all important in determining the rights of the parties.

Something was said in argument upon the point whether parol testimony was admissible to show the contract between the parties.

But the decisions of this state in accord with the weight of authority in other states, are, that as between the immediate parties, parol evidence is admissible to show the actual agreement upon which an endorsement of negotiable paper is made, and that the endorsement may be filled up accordingly: *Comparee v. Brockway*, 11 Hum. 260; *Iser v. Cohen*, 1 Bax. 421; 2 Daniel Neg. Instr., § 710, 1765; Story's Prom. Notes, § 459; *Rey v. Simpson*, 22 How. 341. And when the promise has arisen out of some new consideration of benefit or harm moving between the new contracting parties, it is not within the Statute of Frauds: *Hall v. Rodgers*, 7 Hum. 536; Story's Prom. Notes § 437. The note under consideration is negotiable under our Statute Code, § 1957. The contest is therefore narrowed down to the liability incurred by the endorsement, either implied by law or shown by the proof.

The decisions on the presumptive status of an irregular endorser of a negotiable note, in the absence of any evidence whatever of intent or contract, are irreconcilably in conflict. When nothing appears but the instrument itself bearing the name of a third person as endorser before the name of payee, and the suit is by the endorsee for value before maturity, some courts treat such third persons as a joint-maker; some as a surety or guarantor in the sense of joint-maker; some as secondarily liable as a guarantor; and some as a second endorser: 1 Daniel Neg. Instr., § 713. The weight of authority is, perhaps, at this time in favor of considering him in such case as a second endorser. For the Supreme Court of Massachusetts, with which court the doctrine of holding such endorser as a co-maker originated, afterwards conceded that, if the point were new, he should be treated by third parties simply as a second endorser, leaving the payee and himself to settle their respective liabilities according to their own agreement: *Union Bank v. Willis*, 8 Met. 504.

Between the payee and such endorser, the weight of authority, as we have seen, is, that parol proof of the facts and circumstances which took place at the time of the transaction and of the intention and agreement is admissible (1 Daniel Neg. Instr., § 711); and such is the settled doctrine of this state, while in the absence of such proof, our courts have adopted the rule that the irregular endorser is to be treated only as a second endorser: *Comparee v. Brockway*, 11 Hum. 355; *Clouston v. Barbieri*, 4 Sneed 336; *Brinkley v. Boyd*, 9 Heisk. 149; *Iser v. Cohen*, 1 Bax. 421. In the last of

these cases, which was a suit by the payee of a note against the endorser, it was accordingly held that an endorser may, by agreement, enlarge his liability, and that it is competent upon the trial to show by parol evidence the nature and extent of his undertaking.

The endorsement sued on was made before the delivery of the note to the payee for the accommodation of the maker, and the evidence disclosed the fact that when the payee objected to the form of the paper, the endorser said it was the same thing as if he had signed his name on the face of the note, and he was held liable as a co-maker.

The principles of our decisions are unquestionably sound, though there may be some doubt as to the correctness of its application to the facts of one or two of the cases. In *Brinkley v. Boyd*, 9 Heisk. 149, there was nothing to rebut the legal presumption that the defendant intended to become a second endorser. "The proof does not show," says the eminent judge who delivered the opinion of the court, "any understanding, intention or agreement on the part of Brinkley as to the nature of the liability assumed by him in said endorsement."

To the extent of the actual ruling on the facts, the decision is sustained by the general principle, although the payee of the note may have had reason to suppose, from the nature of the transaction, that the defendant intended to assume a higher grade of responsibility, or, at any rate, a responsibility to him. For it may be that the defendant was induced to endorse the note for the accommodation of the maker, under the assurance that he was to be second and not first endorser.

As between the payee and endorser, whatever may be the rights of innocent third parties, the former may well be required to show that the latter can only be made liable to him by agreement, either express or fairly implied from the conversation between them, or the facts and circumstances shown in proof.

In *Comparee v. Brockway*, 11 Hum. 355, it does not appear that the payee had ever had any interview with the defendant, whom he was suing as endorser, nor that the witness examined was present when the endorsement was made. The witness proved that the defendant agreed to endorse the note as accommodation-endorser of the maker for the payee's benefit. It does not appear that the liability of the defendant as endorser was fixed by demand and notice, and it does appear that the blank endorsement was

filled up by plaintiff's counsel, by writing above it "For value received, I promise the payment of this note to R. N. Brockway." The opinion of the court was delivered by Judge MCKINNEY, one of the most logical reasoners and accurate thinkers of the judges who have presided in this court. The logic of his argument is, that there is no sufficient proof to sustain the endorsement as filled up, that the endorsement is consequently a blank endorsement, and the defendant might have been charged as endorser. The mode he suggests by which the defendant might have been charged as endorser is, that the payee could have endorsed the note, thus making it negotiable and putting it into circulation, and at the same time taking care to restrict his own liability. This suggestion is apparently sanctioned by the reasoning of the chancellor in the Court of Errors of New York, in *Hall v. Newcomb*, 7 Hill 416. But there is a good deal of point in Senator Bockee's reply in that case to the suggestion, that "this sort of *finesse* and shuffling game is below the dignity of the law." And the point has been directly ruled otherwise, upon a similar case to the one Judge MCKINNEY thought he had before him, namely: a blank endorsement without more before delivery to the payee, in *Phelps v. Vischer*, 50 N. Y. 69. Seeing the narrowness of his standing-ground, Judge MCKINNEY, with commendable caution, concluded his opinion thus: "We go no further than to hold that a blank endorsement in a case like the present creates no other liability than that of an ordinary commercial endorsement, and that the endorser, in the absence of countervailing proof, cannot be held bound in any other or different form." In this, then, the decision is in accord with the general principles recognised.

In *Clouston v. Barbieri*, 4 Sneed 336, the suit was by the payee against the endorser as a joint promisor with the maker. A witness proved that the note was given for land sold by the payee to the maker; that the defendant, in the presence of the payee, agreed to go the maker's security, and upon this consideration the payee agreed to give up any lien on the property sold. The witness was, however, not present when the notes were given. The learned judge who delivered the opinion of the court in this case, holds that the word "security" might apply as well to an endorsement as to a liability as co-maker of the note, and as the defendant did become endorser instead of surety on the face of the paper, he must be treated as an endorser. This case, he says, "can only be

regarded as a blank endorsement of commercial paper, and as such could only be filled up with a general endorsement, leaving to the endorser all the advantages and liabilities incident to that character and none other or different." Conceding the correctness of this conclusion, the decision was also in accord with the principles recognised by our courts.

I am free to say that while conceding the correctness of the law as announced in these opinions, I think it was wrongly applied to the facts of these cases. There was evidence in both of them to show knowledge on the part of the endorsers of the facts of the case, and an intention on their part to become directly bound to the payees for the price of the consideration received by the makers of the notes on the faith of the endorsement. If they could not be held liable as endorsers, and it is conceded in the first case that it could only be done by indirection, what Senator Bockee styles a "sort of *finesse* and shuffling game," and it seems to be taken for granted in the last case that it could not be done at all, then upon the universally recognised maxim "*ut res magis valeat quam pereat*" they ought to have been held as guarantors or co-makers. At any rate, there was enough evidence in both cases to have gone to the jury upon the question of intent, and their verdict would doubtless have been, as it was on the first trial in the *Brockway case*, in favor of the plaintiffs.

The case before us differs from all those cases we have been considering in two respects. In the first place, the endorsement was made after the maturity of the note, and therefore the presumption of the law arising from a blank endorsement at the inception of negotiable paper does not arise. In the second place, the endorsement was made in the presence of the personal representative of the payee, upon a new consideration then passing, and under such circumstances as to demonstrate that the endorser intended to become bound directly to the payee. In his masterly summary of the liabilities created by irregular endorsements, Mr. Justice CLIFFORD says, "that if the endorsement be subsequent to the making of the note at the request of the maker, pursuant to a contract with the payee for further indulgence, the endorser is liable as guarantor: *Rey v. Simpson*, 22 How. 341. In Vermont the courts hold the endorser liable as co-maker; *Strong v. Ricker*, 16 Vt. 564. All the other cases which I have been able to find, treat such an endorser as a guarantor: *Trist v. Cutter*, 31 Me. 536; *Tenny v.*

Price, 4 Pick. 485; *Beckwith v. Angell*, 6 Conn. 315; *Oakley v. Booman*, 21 Wend. 588; *Greenaught v. Sneed*, 3 Ohio St. 415; Sto. Prom. Notes, § 133, 477; 1 Dan. Neg. Instr. 715. I find no cases where he has been treated simply as an endorser. And even if the presumption of law arising solely from the advancement of a past due note were the same as in the case of endorsement at the inception of the note, the facts and circumstances attending the endorsement in the present instance would remove the presumption and bring it within the authorities.

The decree of the chancellor must be reversed with costs, and a decree entered here in accordance with this opinion.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF ILLINOIS.²

SUPREME COURT OF MICHIGAN.³

SUPREME COURT COMMISSION OF OHIO.⁴

ADMIRALTY.

Proceedings in rem are exclusively cognisable in the admiralty, and the question whether a case is made for the recall of property released under bond, or stipulation in such a case, must, beyond all doubt, be determined by the courts empowered to hear and determine the matter in controversy in the pending suit: *United States v. Ames et al.*, S. C. U. S., Oct. Term 1878.

ANIMALS.

Owner's Liability for Injury by them.—The owner of domestic or other animals not naturally inclined to commit mischief, such as dogs, horses and oxen, is not liable for any injury committed by them to the person or personal property of another, unless it be shown such owner previously had notice of the animal's mischievous propensity, or that the injury is attributable to some other neglect on his part, it being in general necessary, in an action for injury committed by such animals, to allege and prove a *scienter*: *Marean v. Vanatta*, 88 Ills.

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1878. The cases will probably be reported in 7 or 8 Otto.

² From Hon. N. L. Freeman, Reporter; to appear in 88 Ills. Reports.

³ From H. A. Chaney, Esq., Reporter; to appear in 40 Michigan Reports.

⁴ From E. L. DeWitt, Esq., Reporter; to appear in 32 Ohio State Reports.

BANK.

Liability of Stockholder.—Where a clause of the charter of a bank was in the following language, viz., “the persons and property of the stockholders shall at all times be liable, pledged and bound for the redemption of bills and notes at any time issued, in proportion to the number of shares that each individual and corporation may hold and possess:” Held, that this provision created a personal liability on the part of the stockholder for all the notes of the bank, in the proportion that the shares held by him bore to all the shares of its capital stock, which any bill-holder could enforce upon the insolvency of the bank, by separate action to the extent of his claim: *Mills v. Scott*, S. C. U. S., Oct. Term 1878.

An action for debt will lie where the amount of the bank’s outstanding indebtedness and the number of shares held by the stockholder can be stated. In such cases, the extent of the latter’s liability is fixed, and the amount with which he should be charged is a matter of mere arithmetical calculation: *Id.*

Actions for debt will always lie where the amount sought to be recovered is certain or can be ascertained from fixed data by computation: *Id.*

BANKRUPTCY.

Fraud, definition of within the meaning of the Bankrupt Act—Fraud, as used in sect. 5117 of the Revised Statutes, means positive fraud or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud or fraud in law, which may exist without imputation of bad faith or immorality: *Wolf et al. v. Stix et al.*, S. C. U. S., Oct. Term 1878.

It does not include such fraud as the law implies from the purchase of property from a debtor with the intent thereby to hinder and delay his creditors in the collection of their debts: *Id.*

Such a purchase does not create a debt from the purchaser to the creditors. As between the debtor and the purchaser, the sale is good, but as between a creditor and the purchaser it is void. The purchaser does not by his purchase subject himself to a liability to pay to creditors the value of what he buys. All the risk he runs is that the sale may be avoided and the property reclaimed for the benefit of creditors: *Id.*

To come within this exception in the Bankrupt Act the debt must be created by fraud: *Id.*

BILLS AND NOTES.

Release of Joint-maker’s liability.—A joint-maker, signing for accommodation merely, is released by an extension granted without his knowledge or acquiescence: *Barron v. Cady*, 40 Mich.

BOUNDARY.

Estoppel by Deed.—Where parties claiming under the same grantor recognise a boundary between them, and one of them afterwards conveys with reference to that boundary and without encroaching upon any rights existing in third parties, he and those who claim under him are

bound by the description as against his grantee, and a change of the recognised boundary by a re-survey will not affect the grantee's rights : *Fahey v. Marsh*, 40 Mich.

CERTIORARI.

Not a Writ of Right.—The common-law writ of *certiorari*, when used for the purpose of correcting the proceedings of inferior tribunals, is not a writ of right, but it issues only upon application to the court upon special cause shown ; and when great public detriment or inconvenience may result from interfering with their proceedings, the writ should be denied : *Trustees, &c., v. School Directors*, 88 Ills.

CHATTEL MORTGAGE.

When for Security only, it is not necessarily Fraudulent.—Although a chattel mortgage on its face may appear to be given to secure an absolute debt, yet, if in good faith it is given in the most part to secure against a contingent liability as surety, the latter being a good consideration, it will not thereby be held fraudulent and void as to creditors of the mortgagor, and although the mortgagee has not in fact paid anything as surety, still, if he will have to pay debts as such, he may hold the property or its proceeds to apply upon the debt for which he is surety : *Goodheart v. Johnson*, 88 Ills.

COMMON CARRIER.

Whether bound to carry to Destination.—Although goods shipped at New York city are marked to the consignee at Bloomington, Ills., the presumption of a contract to carry them to the latter point from the acceptance of the same so marked, may be contradicted and overcome, by proof of an express contract to carry to Chicago only : *Merchants' Dispatch and Trans. Co. v. Moore*, 88 Ills.

CONSTITUTIONAL LAW.

Police Power of States, not infringed by Constitution.—The police power of the states was not surrendered when the people of the United States conferred upon Congress the general power to regulate commerce with foreign nations and between the several states : *Patterson v. Kentucky*, S. C. U. S., Oct. Term 1878.

The police power extends, at least, to the protection of the lives, the health and the property of the community against the injurious exercise by any citizen of his own rights : *Id.*

State legislation, strictly and legitimately for police purposes, does not, in the sense of the constitution, necessarily intrench upon any authority which has been confided expressly or by necessary implication to the national government : *Id.*

A statute of Kentucky provided that certain oils used for illuminating purposes should be inspected by an authorized state officer before being used, sold or offered for sale—such as ignite or permanently burn at a temperature of 130 degrees Fahrenheit and upwards, were recognised by the statute as standard oils, while those which ignite or permanently burn at a less temperature were condemned as unsafe for illuminating purposes. *Held*, that this statute was a police regulation, and did not conflict with any provision of the federal constitution : *Id.*

CONTRACT.

Right to Rescind.—When two parties contract to act as agents to canvass for and sell sewing machines for a company in a particular locality, and the company withdraws them from such place, they will have the right to rescind the contract and cease to act; but if they have given a bond, with sureties, for the performance of their duties, which reserves to the company the right to change the character of the employment, within the scope of the business of the company, they will not have the right to rescind, although directed to canvass in a different locality: *Howe Sewing Machine Co. v. Layman*, 88 Ill.

CORPORATION. See *Bank*; *Evidence*; *Officer*.

Contract of.—The contract of a corporation is presumed to be *infra vires* until the contrary is made to appear: *The Southern Express Co. v. The Western North Carolina Railroad Co. et al.*, S. C. U. S., Oct. Term 1878.

CRIMINAL LAW. See *Witness*.

Absence of Guilty Intent—Evidence.—Where one does an act apparently in violation of a criminal statute, but, in fact, under circumstances that tend to show a want of guilty intention, the excusing circumstances may be given in evidence on the trial, to show his good faith in the transaction, where that is a material element, or that he was ignorant of the facts that would make his acts criminal: *Farrell v. The State*, 32 Ohio St.

A person indicted for selling intoxicating liquors, in violation of the provisions of section 1 of the act to provide against the evils resulting from the sale of intoxicating liquors in the state of Ohio, may, on the trial, show that at the time he bought the article alleged in the indictment to be intoxicating liquor, it was represented to him to be free from alcoholic properties—that he bought it with the understanding and believing that it was not intoxicating liquor, and sold it with such understanding and belief: *Id.*

DAMAGES.

Measure of Damages for defects in Machinery bought on Contract.—The measure of damages for putting up a steam boiler with such defects as to make it worth less than the contract price, is the difference between its value in its defective condition and its value if completed in compliance with the contract: *White v. Brockway*, 40 Mich.

DEBT. See *Bank*.

DEBTOR AND CREDITOR

Purchases made in contemplation of Insolvency—Fraud.—A merchant who had sold goods to a firm just before its failure claimed to have relied on the assurance of a partner that their assets exceeded their liabilities. It was shown that when the vendor's agent had asked one of the firm how he reconciled this assurance with the failure, the latter said something about having lost a good deal of money in a series of years in failures: *Held*, that even though this answer may not have

been material, its admission was harmless: *Shipman v. Seymour*, 40 Mich.

An agent was instructed to inquire into a customer's credit and to sell to him if he was satisfied with his answers. He sent an order to his principal without communicating the answers, and the order was filled: *Held*, that the principal had a right to assume that the inquiries were made and that the answers were satisfactory to the agent before he sent the order: *Id.*

In an action involving the good faith of a firm in buying goods just before they failed, a written answer to an inquiry by the vendor as to their credit, which though true in fact was false in spirit and tended to mislead, was admissible in evidence: *Id.*

Any purchase obtained by false representations as to solvency made by a firm within a period before its failure equal to the period of credit usually allowed to it upon its purchases, may be shown as bearing on the question whether another purchase made within that period was fraudulent or not, in contemplation of insolvency: *Id.*

No inference of fraud can be drawn from the fact that money not yet due remains unpaid, but there is no error in admitting testimony that the purchase price of goods purchased by means of a falsehood, is still unpaid: *Id.*

It is an act of bad faith for a mortgagee to withhold from record a mortgage given him by a debtor in order to shield the latter from demands that have been contracted in ignorance of its existence: *Id.*

When the good faith of a mortgage is in question, the time when it was filed and the use afterwards made of it, may be shown: *Id.*

A purchase made by one who is insolvent and with the purpose not to pay, is void even though the buyer has not made false representations: *Id.*

DEED. See *Boundary*.

Proof to Impeach acknowledgment.—Very clear and satisfactory proof is required to impeach a certificate of the acknowledgment of a deed or mortgage. The uncorroborated testimony of the grantor, or party executing the same, is not sufficient to overcome the evidence afforded by the officer's certificate of the fact, especially when the execution of the deed is not denied, or any undue influence, coercion or fraud shown: *McPherson v. Sanborn*, 88 Ills.

EJECTMENT.

Right of recovery between successive Mortgagees.—In ejectment, where both parties are mortgagees, and they both claim from a common source, the party having the oldest mortgage, from the common mortgagor, who first forecloses and acquires a deed must prevail, as having the paramount legal title. If the junior mortgagee has equitable rights by not being made a party to the foreclosure, he must resort to a court of chancery: *Aholtz v. Zeliar*, 88 Ills.

ESTOPPEL. See *Boundary*; *United States*.

EVIDENCE. See *Debtor and Creditor*; *Insurance*.

Proof of Relationship.—Interrogatories relating to family relation—
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ship, dates of decease and marriages, may well be answered on the basis of family tradition instead of direct personal knowledge: *Van Sickle v. Gibson*, 40 Mich.

Parol Evidence to modify Written Agreements—Resolutions of Appointment—Corporation.—Where a private corporation has power to employ a superintendent, the entry in its proper record book, of a resolution of appointment passed by its directors, is admissible to help establish a claim for salary: *Kalamazoo Novelty Manufacturing Works v. Maculister*, 40 Mich.

Where the immediate issue is whether there was a contract in writing, oral testimony bearing on that issue cannot be excluded on the assumption that such writing exists: *Id.*

A resolution of appointment is *prima facie* not a contract, and can be withdrawn or altered before acceptance: *Id.*

The rule excluding oral evidence to affect a written contract does not apply to a corporate resolution appointing an officer, so as to exclude evidence to show the actual establishment of contract relations under it: *Id.*

Must relate to the Issue.—Evidence must be confined to the issue, and even for the purpose of corroborating the testimony of witnesses, an inquiry into facts entirely collateral, leading to a controversy over matters altogether foreign to the case before the court cannot be permitted: *Henkle v. McClure*, 32 Ohio St.

FORMER ADJUDICATION. See *Set-off*.

FRAUD. See *Bankruptcy*; *Debtor and Creditor*

FRAUDS, STATUTE OF.

Parol promise to Pay—What is another's Debt.—E. contracts with S. to build a house, and S. contracts with G. to furnish labor and materials. G. refuses to furnish such labor and materials, except upon a promise made to him by E. that he himself will pay the bill out of funds coming to S.: *Held*, to be a contract not within the Statute of Frauds so as to make a writing necessary: *Estabrook v. Gebhart*, 32 Ohio St.

The work being done, and it being agreed by all that E. should pay G., who was to give up his claim against S. and look to E. alone for payment; this is such a contract as need not be in writing under the statute: *Id.*

GOVERNMENT. See *United States*.

HUSBAND AND WIFE. See *Trust*; *Witness*

Married Woman—Charging her Separate Estate—Subscription to Corporation.—An indebtedness incurred by a married woman, for the benefit of herself or her separate property, and upon its credit, and the giving of a note or other obligation therefor, are facts from which a court of equity may imply and enforce a charge against such property: *Rice v. Railroad Co.*, 32 Ohio St.

But an intention to charge such property, will not be implied, merely from the giving of a note or other obligation by a married woman: *Id.*

Neither will her separate property be made liable for her general

engagements, in the absence of a contract valid in law to bind the same, or of such facts and circumstances as make it, as between the parties, just and equitable : *Id.*

When a married woman subscribes to capital stock of a railroad corporation, by which she agrees to take and pay for a certain number of shares of said stock, but makes default in payment, and action is brought to charge her separate property with the amount of such subscription : *Held*, That in the absence of any proof that either party dealt on the credit of such property, equity will not imply or enforce a charge against the same : *Id.*

Dower—Mortgage.—Where, in a suit brought to enforce a vendor's lien for purchase-money, to which the vendee and his wife, and also the holder of a subsequent mortgage executed by the vendee alone, are made defendants, and the proceeds of sale of the land covered by the liens are more than sufficient to discharge the vendor's claim, the wife is entitled, as against such mortgages, to assert her contingent right of dower in the surplus fund : *Unger v. Leiter*, 32 Ohio St.

But such right of the wife must be protected in a mode which will not interfere with the right of the mortgagee to subject the whole estate of the husband in the premises, to the present satisfaction of the mortgage debt, in its order of priority : *Id.*

Therefore, when such surplus is insufficient to discharge fully the mortgage debt, the court should not (against the will of the mortgagee) direct one-third of the surplus fund to be put on interest by the sheriff, during the life of the wife, for the purpose of securing her contingent dower interest : *Id.*

The proper course, in such case, is to award to the wife from the surplus fund, the value of her contingent right of dower therein, to be ascertained by reference to the tables of recognised authority on that subject, in connection with the state of health, and constitutional vigor of the wife and her husband : *Id.*

INJUNCTION. See *Nuisance*.

INSURANCE.

Perils of Navigation—Seaworthiness—Evidence.—When a steamboat is shown to have been seaworthy at the time she was insured, and no intervening circumstance occurs to render her unseaworthy, her seaworthiness is presumed to continue ; but when, during the life of the policy, she springs a dangerous leak, without apparent cause, a new presumption arises—that of unseaworthiness ; yet, as this new presumption is not a conclusive one, the owners are not required, to entitle them to recover for the loss, to show the identical cause of her loss, but may show a probable cause : *Insurance Co. v. Tobin*, 32 Ohio St.

In case of loss from some unknown cause, a person conversant with steamboat navigation, and who is, from actual experience, familiar with the perils attending steamboat navigation on the privileged waters and other of the western rivers, may give his opinion, and say whether a steamboat, while being navigated thereon, with ordinary skill and care, might, without apparent or known cause, suddenly spring a leak and sink from some unknown peril of the river : *Id.*

When the actual effect of a known agency is unknown, and the opinion of one familiar, by actual observation, with the matter under consideration, is the best testimony the subject-matter to be investigated affords, the opinion of such person may be received as testimony; hence, it was competent to receive as testimony the opinion of skilled river navigators, familiar with the subject, as to the effect the wave-swells made by a larger steamboat would have upon a smaller and heavily-laden one, while passing: *Id.*

The statements of a steamboat captain, made in the discharge of his duty as commander of the vessel, while she is in a sinking condition, and he is in the act of seeking aid of another to relieve her from present peril of loss, as to her perilous condition, how and where she was leaking, made under such circumstances, his statements accompanying his acts, and explanatory of them, are *res gestæ*, and therefore competent testimony: *Id.*

Waiver of Forfeiture.—Where a mutual insurance company imposes forfeiture, in case a loss occurs while its assessments are still unpaid, but its local agent receives past due assessments with knowledge of a loss and forwards them to the company without notifying them of it, and they receive them and two or three weeks afterward order the loss to be paid when adjusted, they cannot afterward refuse payment on the ground of delay in paying the assessments, since they have waived that by receiving them when over due and ordering payment: *Farmers' Mutual Fire Ins. Co. v. Bowen*, 40 Mich.

A note written by plaintiff's attorney before suit, and expressing the opinion that defendant is not liable, is not admissible in evidence for the defence: *Id.*

INTOXICATING LIQUORS. See *Criminal Law*.

JURY. See *Trial*.

MASTER AND SERVANT.

Risks of Employment—Injury to Railroad Employee.—A switchman while standing on the foot-board of a tender that was backing on a side-track, let go the hand-rail to shift his lantern from one hand to the other, and was thrown off by a jerk caused by a worn rail left there by his fellow employees, the trackmen. He had full means of knowing the condition of the track, and the custom of the road as to using worn rails for side-tracks: *Held*, that the risk was one of the ordinary risks of his employment, and that he had no ground of recovery: *Michigan Central Railroad Co. v. Austin*, 40 Mich.

MORTGAGE. See *Debtor and Creditor*; *Ejectment*; *Husband and Wife*.

NUISANCE.

Injunction against threatened Nuisance.—Whether injunction to restrain threatened injury is matter of right—*Quære*. *Hall v. Rood*, 40 Mich.

Injunction will not be granted where such relief is disproportionate to the injury: *Id.*

A wooden building encroached six inches on a private alley for more than twenty years. The owner attempted to veneer it with brick, where-

by it would encroach three inches more. It did not appear that the encroachment would materially injure the right of way. *Held*, that the adjacent owner was not entitled to remedy by injunction: *Id*.

OFFICER.

When delegated authority presumed.—The law presumes that persons acting in a public office have been duly appointed, and are acting with authority, until the contrary is shown. If officers of corporations openly exercise a power which presupposes a delegated authority for the purpose, the acts of such officers will be deemed rightful, and the delegated authority will be presumed: *Keely v. Sanders et al.*, S. C. U. S., Oct. Term 1878.

An officer *de facto* is not a mere usurper, nor yet within the sanction of law, but one who, *colore officii*, claims and assumes to exercise official authority, is reputed to have it, and the community acquiesces accordingly: *Hussey v. Smith*, S. C. U. S., Oct. Term 1878.

The acts of such officers are held to be valid because the public good requires it: *Id*.

PARENT AND CHILD.

Liability of Father for Necessaries supplied to Infant.—Where a father has supplied his minor son with necessaries, or is ready to supply them, he cannot be bound by a contract the son may make with a third person for the purchase of goods without his authority, although they may be regarded as necessaries: *Johnson v. Smallwood*, 88 Ills.

PAYMENT.

When voluntary, cannot be recovered back, though demand illegal and written Protest filed—Taxation.—Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary: *Union Pacific Railroad Co. v. County Commissioners of Dodge Co.*, S. C. U. S., Oct. Term 1878.

When, however, a party not liable to taxation is called upon peremptorily to pay upon a tax-warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and by showing that he is not liable, recover it back: *Id*.

Where, however, no attempt has been made to serve a tax-warrant, but before any active steps whatever have been taken to enforce the collection of taxes, one present himself at the tax-office, and in the usual course of business pays in full everything that is charged against him, accompanying the payment, however, with a general protest against the legality of the charges and a notice that suit would be commenced to recover back the full amount that is paid: *Held*, that such a payment is not compulsory in such a sense as to give a right to recover the money back: *Id*.

RAILROAD. See *Master and Servant*.

SALE. See *Debtor and Creditor*.

SET-OFF.

Set-off of Judgment—Former Adjudication.—B. had a contract with M., but sued him on the common counts before a justice to recover back an overpayment. He did not put the contract in issue, though he gave M. credits under it. M. filed no set-off, but immediately sued B. before another justice for the whole amount of his bill: *Held*, that the judgment in the first suit did not bar the second: *McEwen v. Bigelow*, 40 Mich.

A plaintiff cannot fix the amount of a contested bill by giving credit for what he claims it should be: *Id.*

A defendant can withhold his claim of set-off to be litigated in another suit: *Id.*

A judgment recovered before one justice can be ascertained and applied by another in satisfaction of a counter claim recovered before him by the other party: *Id.*

STATUTE.

When Remedy is exclusive—Where a statute creates a new offence by prohibiting and making unlawful anything which was lawful before, and provides a specific remedy against such new offence (not antecedently unlawful) by a particular sanction and method of proceeding, that method of proceeding and none other, must be preserved: *Commissioners, &c. v. Bank of Findley*, 32 Ohio St.

By sect. 15 of "an act to establish an independent treasury of the state of Ohio," any person advising, aiding or participating in the loaning of the public moneys, is, with the public officer who makes such loan, guilty of embezzlement, and, on conviction, is subject to imprisonment and to a fine in double the amount so embezzled. Such fine is a judgment in favor of the party whose funds are so embezzled, to be collected as other judgments at law, and can only be satisfied or released by such party: *Held*, that for a violation of said section, by advising, aiding or participating in lending the public moneys, this section provides for a new offence, and gives a specific remedy to the injured party in the judgment therein provided for, and such remedy is exclusive of a civil action for the same offence: *Id.*

TAXATION.

Presumption against Exemption.—The power of taxation is an attribute of sovereignty, and is essential to every independent government. Stripped of this power it must perish. Whoever, therefore, claims its surrender must show it in language which will admit of no other reasonable construction. If a doubt arise as to the intent of the legislature, it must be solved in favor of the state: *Hoge v. Richmond and Danville Railroad Co.*, S. C. U. S., Oct. Term 1878.

TRIAL.

Practice—Opening and Conclusion to Jury.—The party holding the affirmative of the issue, as a general rule, ought to open and close the

evidence and argument, and there being a number of issues, if the plaintiff holds the affirmative of any one, or if any evidence material to his case is required of him, he ought to begin. In determining the question, however, upon a complicated state of pleading, a liberal discretion is allowed to the court trying the cause, and this discretion will not be reviewed, except upon a plain case of error: *Montgomery v. Swindler*, 32 Ohio St.

Juror—Misconduct of.—The mere fact that a juror in a civil case drank intoxicating liquor during an adjournment of the court while the trial was in progress, is not a sufficient reason for granting a new trial, unless there be reason to suspect it may have had some influence on the final result of the case: *Pittsburgh, Cincinnati and St. Louis Railway Co. v. Porter*, 32 Ohio St.

Any attempt on the part of the prevailing party or his attorney in the case, to corrupt a juror, though it be not shown to be successful, is a good ground for a new trial: *Id.*

Where it appears that during the progress of a trial, the prevailing party or his attorney has furnished intoxicating liquors to a juror, it is a good ground for a new trial, unless it is clearly shown that it was not intended to influence his action in the case, and that it had no influence on his mind as a juror: *Id.*

TRUST.

Implied—Evidence—Husband and Wife.—A trust raised by implication of law may be proved by parol: *Newton et al. v. Taylor*, 32 Ohio St.

An implied or constructive trust may be established from the acts of a party who has obtained money upon the faith of his agreement to buy lands in the name of his wife, and, having bought them, takes the title to himself: *Id.*

A husband, so receiving money, which would not have been advanced unless upon the agreement that it was for the wife's benefit, and to be invested in her name, is an agent for the wife, and by taking the deed to himself, under such circumstances, makes himself a trustee *ex maleficio*: *Id.*

If the husband is a participant in inducing the purchase for the wife's benefit, receives the money for that purpose to invest in her name, and then buys for himself, this is such a fraud as will create a trust against him and those claiming under him with notice: *Id.*

When it arises.—Where one accepts notes of another in trust to pay such person's debt, and agrees with the creditor to either turn over the note to him, or when collected to pay him the money, and enters upon the performance of the undertaking, there will arise an obligation on his part to execute the trust faithfully, and an action lies in favor of the creditor for a failure to do so, he makes himself a trustee for the creditor, even though he receives no compensation: *Walden v. Kurr*, 88 Ills.

UNITED STATES.

Not suable directly or indirectly—Judgment in Ejectment against its Officers not an Estoppel to the Government.—The United States filed a bill to quiet the title to certain lots in its possession in San Francisco; the defendant set up, by way of estoppel, certain judgments in eject-

ment rendered by the state courts, at the suit of his grantor, against certain officers of the government who, as its agents, had possession of the lots; in those actions the district-attorney, and additional counsel employed by the Secretary of the Treasury appeared for the defendants, and the title was contested on the trial: *Held*, that these facts constituted no estoppel against the government, although in California a judgment in ejectment is, in ordinary cases, an estoppel both against the tenant in possession and against the landlord who has notice of the suit: *Carr v. The United States*, S. C. U. S., Oct. Term 1878.

The United States cannot be estopped by proceedings against its tenants or agents; and cannot be sued without its consent; and such consent can only be given by act of Congress. No state can pass a law making the United States suable in its courts: *Id.*

Without an act of Congress, no direct proceedings will lie at the suit of an individual against the United States or its property; and no officer of the government can waive its privilege in this respect, nor lawfully consent that such a suit may be prosecuted so as to bind the government: *Id.*

The government can only hold possession of its property by means of its officers or agents, and to allow them to be dispossessed by suit, would enable parties always to compel the government to come into court and litigate its rights. Therefore, when it becomes apparent by the pleadings, or the proofs, that the possession assailed is the possession of the government by its agents, the jurisdiction of the court ought to cease, and its proceedings cannot be set up as an estoppel against the government: *Id.*

The cases in which the property of the government may be subjected to claims against it, are those in which the property is in juridical possession by the act of the government itself, or has become so without violating its possession, and it seeks the aid of the court to establish or reclaim its rights therein; in such cases it is equitable that the prior rights of others to the same property should be adjudicated and allowed. The cases of *The Siren*, 7 Wall. 152, and *The Davis*, 10 Id. 15, cited and approved: *Id.*

VENDOR AND VENDEE.

Rescission by Vendee—Surrender of Possession.—A purchaser of land by contract, who has paid the price and taken possession, cannot maintain an action to recover back the purchase-money, without giving up the possession of the premises. He cannot retain the use of the estate and maintain an action to recover back what he has paid: *Long v. Saunders*, 88 Ills.

WITNESS.

Wife not competent in Prosecution of Husband.—A wife is not a competent witness for her husband in a criminal prosecution; and her incompetency in such cases is not removed by either the criminal or civil codes of procedure: *Schultz v. State*, 32 Ohio St.

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SUPPORT—LATERAL AND SUBJACENT.

THE maxim *cujus est solum ejus est usque ad cælum, et ad inferos* expresses the interest which a fee-simple owner has in land. He owns everything contained between lines drawn from the centre of the earth through the boundaries of his surface property, and produced to infinity. Theoretically, he has a right in the one direction, to erect a structure reaching the heavens; or, in the other, to excavate to the lowest depths.

In order, however, to the proper enjoyment of these rights, it is necessary that there be a mutual yielding of interest; the theoretical must be modified by the practical. This common consent is embodied in the familiar maxim *sic utere tuo, ut alienum non lædas*. The meaning of this would seem to be that the *absolute* ownership of property is *qualified* in its use.

A consideration of the subject of SUPPORT, *Lateral* and *Subjacent*, will furnish an illustration of the conflict between the two common-law maxims.

I. LATERAL SUPPORT.—The obvious distinction between the soil in its natural state and the soil whose weight is increased by artificial means, suggests the most appropriate division of the subject.

(a) *The Natural Soil*.—It is a well settled principle of law, that the owner of land in its natural state, has a right to have it supported by his neighbor's soil.

The Code of Solon recognised this principle, as may be seen from the quotation, "If a man dig a sepulchre, or a ditch, he shall

leave (between it and his neighbor's land), a space equal to its depth; if he dig a well, he shall leave the space of a fathom."

This enactment was, in substance embodied into the Roman Law of the Twelve Tables, and thence transferred to the Pandects of Justinian: Digest X., b. 10, tit. I., § 13.

The doctrine has prevailed from the earliest times, in the English law. It is well formulated by Rolle, in the case of *Wilde v. Minsterley*, Rolle Abr. "*Trespass*," I., pl. 1. "It seems that a man who has land closely adjoining my land, cannot dig his land so near mine, that mine would fall into his pit, and an action brought for such an act would lie." The later English decisions uniformly recognise the law as laid down by Rolle, and the consideration of a very few cases, will show how closely the American law has followed the English.

A very important case, and one always cited when the subject is discussed, is that of *Thurston v. Hancock*, 12 Mass. 220. PARKER, C. J., in the course of his opinion, remarks: "A man, in digging upon his own land, is to have regard to the position of his neighbor's land, and the probable consequences to his neighbor, if he digs too near his line; and if he disturbs the natural state of the soil, he shall answer in damages."

The case of *Farrand v. Marshall*, 16 Barb. 380, sustains the law as stated in the above case, that the right to natural support is incident to property.

Chancellor WALWORTH, in delivering the opinion in *Lasala v. Holbrook*, 4 Paige 169, says, "I have a natural right to the use of my land, in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots. And the owners of those lots will not be permitted to destroy my land, by removing this natural support, or barrier."

The Pennsylvania case bearing most directly on the subject, is that of *Altwater v. Woods*, 1 W. N. C. 23 (Pa.). Altwater, the defendant below, undertook to reduce his lot to the grade of the street, in the city of Allegheny, and as a consequence, the soil of the plaintiff's lot fell into the excavation. The court, in charging the jury, allowed the defendant the right to excavate his own ground; but held that if he could not excavate without injury to his neighbor's natural soil, he was to be entirely deprived of his right.

The doctrine was also applied in *Bell et al. v. Reed*, 31 Leg. Int. 389 (Pa.), where the complainant brought a bill in equity to restrain

the respondents from excavating so near complainant's land as to deprive it of its natural support. The court, in accordance with the Master's report, awarded a perpetual injunction, restraining the respondents from excavating within forty feet of complainant's land. On appeal the injunction was so modified as to allow the appellants to strip their land up to the appellee's line, "provided they furnish a sufficient artificial support for appellee's land."

This modification calls attention to another very important principle, and one which is recognised in other than Pennsylvania cases: *Thurston v. Hancock*, *Lasala v. Holbrook*, *supra*; *Radcliff v. Mayor, &c.*, 4 Comst. 195.

In our zeal for establishing and protecting the right of lateral support, which a man has in his neighbor's soil, there is danger of our overlooking the fact that the neighbor also has rights which are to be respected. His land may be of such a quality as to be useful or valuable only by being excavated and disposed of; as in the very common cases of sand-pits and stone quarries. Yet, if the principle under consideration is applied in its full force, he will be prevented from gaining as much profit from his land as he should gain. Hence, the wisdom of the rule or permission in *Bell v. Reed*, allowing the appellants to support their neighbor's soil artificially, and thus to receive the full benefit of their own soil. But it would seem that, notwithstanding any care or skill on the part of the defendant, still, if the plaintiff's soil falls in as a consequence of the excavation, the defendant is liable for all damages: *Hayes v. Cohoes Co.*, 2 Comst. 162.

The majority of the cases considered arose with reference to land burdened with buildings. But in them all the doctrine of lateral support to the natural soil is impliedly admitted, if not expressly stated to be the law. The principle, originating in an antiquity, preserved in the civil and the common-law system, is well recognised in the law of to-day.

(b) *The Soil Burdened*.—As to the right of support which adjoining landowners have to each other's soil, there is a manifest distinction to be drawn between lands as left by nature and land whose weight is increased by artificial means. While it is plainly in accordance with law and justice that I should have undisturbed enjoyment of my *land*, it is not so clearly lawful or just that I should increase the weight of my land, and call upon my neighbor not to disturb my newly-acquired right, if a right it be. As we

have before seen, the neighbor has as much right to his soil as I have to mine; and consequently he may dig it up and carry it away, provided he does not injure my natural soil in so doing. In preventing him from excavating, lest he undermine my building, I would be committing a positive wrong, that is, would be depriving him of a natural right.

Lord TENTERDEN, in delivering the opinion of the court in *Wyatt v. Harrison*, 3 B. & Ad. 871, after referring to the right of action for damages occasioned to the natural soil by excavation, remarks: "But if I have laid an additional weight upon my land, it does not follow that he (my neighbor) is to be deprived of the right of digging his own ground because mine will then become incapable of supporting the artificial weight which I have laid upon it." The same view is held in *Thurston v. Hancock*, 12 Mass. 220, and in *Lasala v. Holbrook*, 4 Paige 169; in which latter case the chancellor, after speaking of the neighbor's right to dig upon his own land, says: "I cannot, therefore, deprive him of this right by erecting a building on my lot, the weight of which will cause my land to fall into the pit which he may dig, in the proper and legitimate exercise of his previous right to improve his own lot." The foregoing authorities are sufficient to establish the general rule, that a landowner has no natural right to increase the lateral pressure of his soil, or to add to his neighbor's obligation of natural support. But as buildings of some kind are necessary to the comfort and convenience of landowners, and since they have no natural right to the support of the adjacent soil, it is obvious that there must be some artificial right established either by usage or law.

Easements are acquired by grant, express or implied, or by prescription presuming a grant. A grant of an easement may be implied from certain peculiar circumstances attending the transfer of land. It has been held in several cases, for instance, that where the owner of two lots of ground conveys one of them upon which a house is standing, he cannot excavate so as to affect the house because an implied right of support has passed with it: *McGuire v. Grant*, 1 Dutcher 356; *United States v. Appleton*, 1 Sumn. 492. Another case extends the owner's disability to his assigns: *Lasala v. Holbrook*, 4 Paige 169. It has been held that where an owner divides his estate by the alienation of a part, the alienee becomes entitled to all the continuous and apparent easements: *Keiffer v. Imhoff*, 2 Casey 438 (Pa.). But while the easement of

support to buildings may be continuous, it is not apparent. Hence, in accordance with the maxim *expressio unius exclusio alterius est*, it follows that, under the last case, such an easement does *not* pass by an implied grant on the division of an estate.

Easements may also be acquired by prescription presuming a grant. The common lawyers, from the earliest times, manifested a certain reverence for whatever was *ancient*. Back to a time whereof the memory of man runneth not to the contrary, was, with them, a favorite expression. It was owing to this tendency that houses, ancient or upon ancient foundations, obtained an advantage over those newly erected. Ancient buildings were such as had, by lapse of time, gained a right to support by prescription; this right being more properly an *easement*, while the right to lateral support of land by land, is rather an incident of property than an easement: *Humphries v. Brogden*, 12 Q. B. 739.

The reasoning was similar to that regarding the acquirement of land, under the Statutes of Limitations: that as the mere possession of land ripens, by lapse of time, into an indefeasible title; so, the right of support to buildings, originally no right at all, becomes one by the length of time during which it has remained undisturbed. The doctrine of the common law is, in short, that the easement of support to artificially weighted land, may be acquired by prescription presuming a grant, as well as by a grant itself. The principle is well illustrated by Lord ELLENBOROUGH in *Stansell v. Jollard*, 1 Selw. N. P. 444. His language is: "Where a man has built to the extremity of his soil, and has enjoyed his building above twenty years, upon analogy to the rule as to lights, he has acquired a right to a support, or, as it were, of leaning to his neighbor's soil, so that his neighbor cannot dig so near as to remove the support; but it is otherwise of a house newly built."

The common-law doctrine as to prescriptive support is followed in a number of American cases: *Thurston v. Hancock*, 12 Mass. 220; *Lasala v. Holbrook*, 4 Paige 169. But see *Gilmore v. Driscoll*, 122 Mass. 207.

In Pennsylvania, however, we find a different rule prevailing. We will adopt the analogy suggested above by Lord ELLENBOROUGH, and consider first, the Pennsylvania law as to "Ancient Lights," and from that may be inferred the law as to the easement of support by prescription.

In *Haverstick v. Sipe*, 9 Casey 371 (Pa.), LOWRIE, C. J.,

remarks: "It has never been considered in this state that a contract for the privilege of light and air over another man's ground could be implied from the fact that such a privilege has been long enjoyed," and the reason he gives for this is, that "the advantage which one man derives by obtaining light and air over the ground of another is no *adverse* privilege." In *Richart v. Scott*, 7 Watts 460 (Pa.), remarking on the claim of the plaintiff to an implied consent to the support of buildings, and admitting that an easement may be acquired by adverse enjoyment and acquiescence for twenty-one years, KENNEDY, J., says: "But it is difficult, if not impossible to conceive, how an implication or presumption of such license or grant can be made, where there is no *adverse user*, encroachment upon or possession had or taken of any right or thing belonging to another, and nothing done to which any other can make even the slightest color of objection."

Thus it may be seen that one of the essentials to an easement by prescription is an *adverse user* during a certain period. Hence, it being shown that neither the *user* of light over, nor of support to buildings from another's ground, can be called *adverse*, or under a claim of right, it follows that neither right can be established or maintained in Pennsylvania. So far as the law of Pennsylvania is concerned, I am inclined to regard the privilege of support as belonging to that class of easements which are created by express grant only.

Of the two doctrines considered, that of the Pennsylvania courts is clearly the more logical and philosophical. Yet what was long assured as the common-law doctrine as to prescriptive support, has, as we have seen, obtained in England and a number of the United States. We may understand the law of *Stansell v. Jollard* to have remained in full force in the English courts up to December 11th 1877, when it was entirely overruled and swept out of existence by a majority judgment of the Queen's Bench, delivered on that date.

The case of *Angus v. Dalton*, Law Rep. 3 Q. B. Div. 85; 17 Am. Law Reg. N. S. 645; is one of importance, as its manifest tendency is entirely to change the current of the English decisions on the subject of prescriptive support. It was an action brought against defendants for so excavating, as not to leave sufficient lateral support for plaintiff's factory. Plaintiffs had enjoyed the support of the neighboring house and soil for twenty-seven

years. The majority opinion of the court was delivered by COCKBURN, C. J. (MELLOR, J., assenting, LUSH, J., dissenting). His argument is, I think, contained in substance, in the following comprehensive sentence: "To say that by reason of an adjoining house being built on the extremity of the owner's soil, a right of support is to be acquired in the absence of any grant or assent, express or implied, against the adjacent owner, who may be altogether ignorant whether the house or other building is supported by his soil or not, and who, whether he knows it or not, has no means of resisting the acquisition of an easement against himself, either by dissent or resistance of any kind, appears to me to be repugnant to reason and common sense, as well as to the first principles of justice and right." It is not difficult to perceive the similarity between the above reasoning and that of KENNEDY, J., forty years earlier, in *Richart v. Scott*, before cited. Adverse user and acquiescence are correlated, and the two together are essential to the establishment of an easement by prescription. Uninterrupted user amounts to acquiescence. But where nothing is done to which objection can be made, there can be no adverse, no interrupted user, and consequently no acquiescence. It is not a little remarkable that after the lapse of so long a time the doctrine early established in Pennsylvania, and looked upon as a peculiarity of the law of that state, should be adopted by the Court of Queen's Bench as the correct exposition of the common law.

Now, while I may not have the right by merely increasing the weight of my property to prevent my neighbor from using his in a reasonable way, still it is manifest that I have a right to protection from the consequences of his careless or malicious acts. In other words, a man must do neither intentional injury, nor what, through negligence, may amount to injury to his neighbor.

This principle is clearly laid down in the books. In *Dodd v. Hohne*, 1 A. & E. 498, Lord DENMAN, C. J., says, *inter alia*, "A man has no right to accelerate the fall of his neighbor's house." The opinions of TAUNTON and WILLIAMS, JJ., are to the effect that defendants should not have been negligent so as to have injured a house, which from its own weakness would have soon fallen down. The principle is here very strictly applied, but it is admitted in the *syllabus*, that the jury, on the question of negligence, may consider the state of the plaintiff's house.

WOODWORTH, J., in *Panton v. Holland*, 17 Johns. 92, remarks:

"On reviewing the cases, I am of opinion that no man is answerable in damages for the reasonable exercise of a right, when it is accompanied by a cautious regard for the rights of others; when there is no just ground for the charge of negligence or unskilfulness, and when the act is not done maliciously;" and he quotes Baron COMYNS to the same effect.

In *Bentz v. Armstrong*, 8 W. & S. 40 (Pa.), KENNEDY, J., after speaking of the necessary improvements to be made on town or city lots, and the consequent change in the soil, enjoins upon the purchaser, while using his lot for the purpose for which it was bought, "not to produce any detriment or injury to his neighbor in the occupation or enjoyment of his adjoining lot."

It must be remembered, however, that while the neighbor is to use due care and diligence, his liability exists, or does not exist, according to the proper or improper construction of the neighboring house. This is clearly the law as laid down in *Richart v. Scott*, 7 Watts 460 (Pa.). KENNEDY, J., says, in that case, "Every builder ought, in putting up his house, to do it in such a manner as to impose no unnecessary expense or burthen thereafter upon the owner of the adjacent lot, when he shall come to build upon it, or to alter and remodel that which he may have put on it previously."

II. SUBJACENT SUPPORT.—Land may be divided horizontally as well as perpendicularly. The surface of the earth is cut up into sections of square feet, square acres, and square miles. So may its mass be divided into an infinite number of strata. Each stratum may, equally with each acre, have a fee-simple owner. Just as a surface-owner may demand support from an *adjacent* neighbor, so may he, or any upper owner, demand support from a *subjacent* neighbor. Both rights result from the contiguity of two freeholds. There is the same distinction between the natural and the burdened soil. As to the rights of support to the *natural soil*, Lord CAMPBELL, C. J., (*Humphries v. Brogden*, 12 Q. B. 739), shows a perfect similarity. After speaking of the right to lateral support as a "right of property passing with the soil," and hence, requiring no grant, he continues: "*Pari ratione* where there are separate freeholds from the surface of the land and the minerals belonging to different owners, we are of opinion that the owner of the surface, while in its natural state, is entitled to have it supported by the subjacent mineral strata."

The case of *Humphries v. Brogden*, *supra*, in which the above

opinion was delivered, was decided in 1850. There are several other cases (*Harris v. Ryding*, 5 M. & W. 60; *Rowbotham v. Wilson*, 8 H. L. 348; *Backhouse v. Bonomi*, 9 Id. 511,) on the subject, both prior and subsequent to that date, in which a similar view to that of the Chief Justice is held, and it is law in Pennsylvania: *Jones v. Wagner*, 16 P. F. Smith 434.

We are not to infer, however, from the language of Lord CAMPBELL, that the subjacent owner is to be entirely deprived of his right to mine. To prevent any such conclusion, he himself remarks further on in his opinion: "Those strata may, of course, be removed by the owner of them, so that a sufficient support for the surface is left."

This is nothing more than a principle of common sense and justice. A man of the least mental capacity would hesitate in buying a mine were he aware that he would not be allowed to excavate it. He may undoubtedly put the mine to the use for which it was bought; but he must understand this use to be reasonable. It is his duty to furnish a reasonable support to the surface (*Harris v. Ryding*, 5 M. & W. 60,) which is "a support that will protect the surface from subsidence, and keep it securely at its ancient and natural level:" *Humphries v. Brogden*, 12 Q. B. 739. Anything short of this, even in the absence of negligence, will render the lower owner liable for all damages.

This is the normal relation existing between the upper and lower owners of land. But this, of course, may vary according to circumstances; as where the surface-owner, originally holding all the land, has conveyed an estate in the minerals, and by the deed of conveyance the usual mining rights are enlarged. It was held, for instance, in *Rowbotham v. Wilson*, 8 H. L. 348, that the rights of the grantee of minerals depend on the terms of the deed by which they are conveyed. A much stronger case on this point is *Smart v. Morton*, 5 E. & B. 30, the language of which is: "Upon the severance of the surface and the minerals, a deed might be framed empowering the owner of the minerals to remove the whole of them without leaving a support for the surface: compensation being made to the owner of the surface for the damage thereby occasioned to his tenement."

Strong as this is, in favor of the grantee, I do not suppose that in case of gross negligence, he would be free from liability.

As to the *soil burdened*, there is no more natural right to sub

jacent than to lateral support. The right may be acquired at common law, by grant or prescription. The right by prescription is recognised in *Partridge v. Scott*, 3 M. & W. 220, and Lord CAMPBELL, (*Humphries v. Brogden, supra*), though admitting the difficulty of finding whence the grant of such an easement can be presumed, yet, illogical as it may seem, holds that a right to lateral support may be acquired in this manner (referring to the language of Lord ELLENBOROUGH in *Stansell v. Jollard*, 1 Selw. N. P. 444, as an authority for his position), and extends the application of the principle, by analogy, to subjacent support. The principle is adhered to in *Rogers v. Taylor*, 2 Hurlst. & N. 828, with the *query* in addition—whether independently of prescription, the owner of the surface has not a right to the vertical support of the subjacent strata, for the surface and for all reasonable buildings put upon it.

The whole duty of the subjacent owners may be summed up in the one expression "*reasonable use*;" which means that he must work his mines in a manner not materially to injure the surface. When such injury does occur, there is a presumption of negligence on the part of the subjacent owner. If negligence be shown, it matters not whether a house be ancient or modern, the one committing the wrong will be liable. Where a lower owner is working his mine so carelessly that if he continues, injury to the surface will ensue, he may, on complaint, be restrained by a court of equity:" *Lawrence, Merkle & Co.'s Appeal*, 2 W. N. C. 4 (Pa.). As to the question of negligence there are correlative rights and duties. *Caldwell v. Fulton*, 7 Casey 481, and *Jones v. Wagner*, 16 P. F. Smith 434, substantiate this statement. They are to the effect that the upper and under ground estates are governed as other estates, by the maxim *sic utere tuo, ut alienum non lædas*. The upper freeholder is entitled to reasonable support from the lower, while the lower is, in turn, not to be unreasonably deprived of his accustomed rights.

To sum up the entire subject of support, lateral and subjacent, it may be said, that the right to natural support is universally held as law; that the right of support to burdened soil is not a right naturally, but one to be acquired at common law by grant, express or implied, or (as formerly with reference to lateral support and still with reference to subjacent support) by prescription; by the Pennsylvania law, to be acquired, if at all, by express grant only.

We have considered the application of the two maxims and their conflict with each other. The practical has modified the theoretical, and as a result, the language of the law to the landowner is, while your dominion extends from the earth's centre to the highest heavens, you must exercise it according to the dictates of common sense and justice, and so protect your neighbor in the enjoyment of his equally extensive right.

GARNET PENDLETON.

RECENT ENGLISH DECISIONS.

High Court of Justice, Court of Appeal.

NIBOYET v. NIBOYET.

The English Divorce Court has jurisdiction to grant a divorce against a foreigner.

A marriage was solemnized at Gibraltar between a Frenchman and an Englishwoman. The husband resided for several years in England, but being a consul for France he retained his domicile of origin. The wife presented a petition for a divorce, alleging adultery committed in England and desertion. The husband appeared under protest, and prayed to be dismissed. *Held*, that the court had jurisdiction to grant a divorce.

APPEAL from an order of Sir R. J. PHILLIMORE dismissing a petition for a divorce.

The question was, whether the court had jurisdiction to receive a petition for divorce presented by a wife, her domicile of origin being English, the marriage having been celebrated at Gibraltar, and the alleged adultery having taken place in England; the domicile of the husband, who was a consul for France, having been and continuing to be French, although he was residing in England.

Sir R. J. PHILLIMORE dismissed the petition on the ground that the court had no jurisdiction as against a foreigner.

Inderwick, Q. C., and *Swabey*, for the petitioner.—There is no case in which a natural-born subject of the Queen has been refused a divorce on any question of domicile. The divorce might not be recognised in some other countries, but such divorces are constantly granted in every Protestant country. The wife being domiciled here is entitled to a divorce *valeat quantum*. The husband and wife were in this country; the offence was committed here, and they are entitled to the benefit of the law of this country: *Brodie v. Brodie*, 2 Sw. & Tr. 259; *Ratcliff v. Ratcliff*, 1 Id.

467; *Firebrace v. Firebrace*, 47 L. J. (P., S. & D.) 41; *Deck v. Deck*, 2 Sw. & Tr. 90; 29 L. J. (P., M. & A.) 129. If every natural-born subject can, under §§ 27 and 31 of the Act 20 & 21 Vict. c. 85, present a petition, she must have a right to a divorce: *Bond v. Bond*, 2 Sw. & Tr. 93; 29 L. J. (P., M. & A.) 143; *Le Sueur v. Le Sueur*, 1 Prob. & Div. 139; *Simonin v. Mallac*, 2 Sw. & Tr. 67; 29 L. J. (P., M. & A.) 97; *Sottomayor v. De Barros*, 3 Prob. & Div. 1. The question could not have arisen formerly, because the canon law was the same all over the world. The statute 23 Hen. 8, c. 9, as to citation out of the jurisdiction, did not apply if the defendant had appeared. In *Lindo v. Belisario*, 1 Hagg. Cons. 216, the court decided the question. *Donegal v. Donegal*, 3 Phillim. 597, may have been collusive in its origin. In *Shaw v. Attorney-General*, Law Rep. 2 Prob. & Div. 156; and *Lloyd v. Petitjean*, 2 Curt. Cons. 251, the court assumed jurisdiction. No doubt, in many of these cases, the parties did not appear, but that cannot have given the court jurisdiction. It must be admitted that much of the reasoning in *Shaw v. Gould*, Law Rep. 3 H. L. C. 55, is against the petitioner; but all the lords did not concur in the reasoning. The observations in *Warrender v. Warrender*, 2 Cl. & Fin. 488, are strongly in favor of the petitioner.

Gorst, Q. C., and *Greenwood*, for the Queen's proctor.—It is clear that every husband and every wife in every country cannot apply to this court for a divorce. One, at all events, must be domiciled here, and the wife's domicile is that of her husband, so that here both are foreigners: *Deck v. Deck*, 2 Sw. & Tr. 90, is the only case in which the court has pronounced for a divorce between persons not domiciled here. But the courts of one country ought not to make orders affecting the personal status in another country of a person not domiciled here. Even if English subjects by origin domiciled abroad can be divorced here, it does not follow that this court will interfere against a person who has been domiciled here. In *Bond v. Bond*, 2 Sw. & Tr. 93, the court is said to have followed *Deck v. Deck*; but that is not so. *Brodie v. Brodie*, 2 Sw. & Tr. 259, referred to in *Manning v. Manning*, Law Rep. 2 Prob. & Div. 223, is in favor of the respondent, and so is *Wilson v. Wilson*, Law Rep. 2 Prob. & Div. 435. *Sottomayer v. De Barros*, 3 Id. 1, was a very strong case. The doubts as to the wife's domicile raised in *Dolphin v. Robins*, 7 H. L. C. 390, were not shared by all of their lordships. *Pitt v. Pitt*, 4 Macq. 627, shows that there

cannot be a divorce granted unless the parties are domiciled here. *Yelverton v. Yelverton*, 1 Sw. & Tr. 574, and *Tollemache v. Tollemache*, Id. 557, show that the court has no jurisdiction in such cases.

JAMES, L. J.—This case was argued and decided in the court below, and has been argued before us, exclusively on one question, viz: whether an English court has or has not jurisdiction to dissolve the marriage tie between persons not domiciled in England, the dissolution of such a marriage being the real and avowed object of the petitioner in the suit. That such should be the avowed object of the suit, and that the parties should be desirous of having the opinion and decision of the court on that question, does not preclude the court from seeing, or enable the court to avoid seeing, what the real question raised by the pleadings is. The petitioner, after alleging the marriage at Gibraltar, alleges desertion for two years and upwards without reasonable excuse, and adulterous intercourse committed and continued from the year 1867 down to the institution of the proceedings, at and in the neighborhood of Sunderland, in the county of Durham, and therefore in England. The prayer is that the court would be pleased to decree the dissolution of the marriage, but to that is added the usual prayer for general relief. The exact words are, “such other and further relief in the premises as to this honorable court may seem meet.” I read these words as being in substance such further or other relief. The respondent appeared under protest, and pleaded to the jurisdiction in substance that he was by birth and domicile a Frenchman, and that although he had resided in England from the year 1862 to the year 1869, and afterwards from the year 1875 to the commencement of the suit, he so resided in the discharge of his duties in the consular service of his own government. And he sums up thus: “During the whole period of the respondent's absence from France aforesaid, he retained his French domicile, and has not now and never had any domicile in England. By reason of the premises, this honorable court has not had any jurisdiction to dissolve the marriage of the respondent with the petitioner.” And he prayed to be dismissed from all further observance of justice in this suit. But whether the respondent is or is not right in his contention that the court has no jurisdiction to dissolve the marriage, the plea to the jurisdiction must fail if the petitioner be entitled to any relief whatever in the suit, on the facts stated in her petition.

Can there be any doubt that before the English Act of Parliament transferring the jurisdiction in matrimonial causes from the church and her courts to the sovereign and her court, the injured wife could have cited the adulterous husband before the bishop, and have asked either for a restitution of conjugal rights, or for a divorce *a mensa et thoro*, and in either case for proper alimony? The jurisdiction of the Court Christian was a jurisdiction over Christians, who, in theory, by virtue of their baptism, became members of the one Catholic and Apostolic Church. The church and its jurisdiction had nothing to do with the original nationality, or acquired domiciles of the parties—using the word domicile in the sense of the secular domicile, viz., the domicile affecting the secular rights, obligations and status of the party. Residence, as distinct from casual presence on a visit, or *in itinere*, no doubt was an important element; but that residence had no connection with and little analogy to that which we now understand when we endeavor to solve, what has been found so often very difficult of solution, the question of a person's domicile. If a Frenchman came to reside in an English parish, his soul was one of the souls, the care of which was the duty of the parish priest, and he would be liable for any ecclesiastical offence to be dealt with by the ordinary *pro salute animæ*. It is not immaterial to note that dioceses, and states or provinces were not necessarily conterminous. The Channel Islands, which are no part of England, are in the diocese of Winchester, and the Isle of Man is in the province of York; and many similar cases might be found on the Continent. And although the laws of the state sometimes interfered by way of coercion, regulation or prohibition with the Courts Christian, the latter acted *proprio vigore*, and they administered their own law, not the law of the state, and they administered it in their own name, and not in the name of their sovereign. The language of the act creating the existing court, strikingly illustrates this when it enacts that all jurisdiction vested in or exercised by any ecclesiastical court or person in England, &c., shall belong to and be invested in Her Majesty. It was not previously vested in her, although she had appellate jurisdiction as supreme ecclesiastical judge. If before that act had passed, the facts alleged in this petition had occurred, and the injured wife had applied to the Bishop of Durham for such relief in the matter as was then competent to him, is it possible to conceive any principle on which the guilty husband could demur

to the Ordinary's jurisdiction? The wrong done in his diocese, the offending party openly and scandalously violating the laws of God and of the church in his diocese, why should he decline to interfere? What could it be to him whether the offender was born in any other diocese or born in any other country,—Christian, heathen or Mahomedan, and had not in the eye of the secular court abandoned his domicile therein? And what principle of international law could there have been to create the slightest difficulty in the way of a decree for restitution, for separation *a mensa et thoro* or for alimony? The wrongdoer has elected to reside within the local limits of the jurisdiction of the Church Court, and neither the court of the state nor the church or state court of his own country has any ground for alleging that the Church Court appealed to, is usurping a jurisdiction, when it, by ecclesiastical monition, declaration and censure, compels the offending party to give proper redress, or declares the offended party to be thenceforth relieved from the obligation to provide for or to adhere to the bed and board of the other; which was what the decree of divorce, *a mensa et thoro*, really amounted to. If I were asked to define, and it were necessary to define, what in the particular case of matrimonial infidelity, constituted a matter matrimonial in England at the time when the act was passed, I should define it to be a case of infidelity where the matrimonial home was in England—the matrimonial home in which the offended husband ought to be no longer bound to entertain the unchaste wife, or in which the chaste and offended wife ought to be no longer bound to share the bed and board of the polluted husband—the matrimonial home, the purity of which was under the watch and ward of the church there. I will give two illustrations of my meaning. It appears to me impossible to suppose that an English court would lose its jurisdiction or not have jurisdiction because the guilty party consorted with his or her paramour outside the territorial limits of the diocese or on a journey. And, on the other hand, I do not think that an English court ought to have exercised or would have exercised jurisdiction in the case of a French matrimonial home by reason of an act of infidelity done during a visit, or in transit to or through the English diocese. The proper court in that case would have been a French court. I arrive, therefore, at the conclusion that the facts stated in the petition would have constituted a matter matrimonial in England, in which some jurisdiction would,

but for the passing of the act, have been vested in, and exercised by an ecclesiastical court or person in England, and that such jurisdiction now belongs to and is vested in her Majesty. This appears to me sufficient to dispose of the plea which denies all jurisdiction whatever in the subject-matter of complaint.

But the same considerations appear to me also sufficient to dispose of the question which was discussed and considered in the court below, viz., whether the court can under the English statute, decree a dissolution of the tie. The act was passed expressly "to constitute a court with exclusive jurisdiction in matters matrimonial in England, and with authority in certain cases to decree the dissolution of a marriage." I read that as "in certain of *such* cases," "in certain of *such* matters matrimonial" in England. And that is followed by the 27th section, which is quite universal in its language. "It shall be lawful for any husband; * * * it shall be lawful for any wife." That universality is, of course, to be limited by the object and purview of the act, and is to be read thus: "And in any such matrimonial matter in England it shall be lawful for any husband or wife, &c." And except such limitation I am unable to find any limitation which, on any principle of construction, ought to be implied. Of course it is always to be understood and implied that the legislature of a country is not intending to deal with persons or matters over which, according to the comity of nations, the jurisdiction properly belongs to some other sovereign or state, But I do not find any violation of that comity in the legislature of a country dealing as it may think just with persons, native or not native, domiciled or not domiciled, who elect to come and reside in that country, and during such residence to break the laws of God or of the land. I am unable, more especially, to imply any limitation of the authority of the court by reference to the principles of law which were, at the passing of the act, in the course of development in the American courts, where it is now settled that the jurisdiction is to be determined by the domicile of the complaining party at the time of the complaint brought. No such principle had then been established or recognised in any court in this kingdom, and, on the contrary, in one very important division of the realm, Scotland, the Scotch courts had exercised jurisdiction in entire disregard of any such principle. The fact was present to the English legislature with full knowledge of certain very painful and embarrassing consequences resulting

from it. But the legislature did not think it necessary or fit to make any provision in that behalf. A Scotch divorce *a vinculo*, between persons not Scotch by domicile, was held to be void in England as to an English marriage; but so far as Scotland was concerned, and so far as any consequences of the divorce would have to be determined by the Scotch courts, the divorce was, to all intents and purposes, valid and effectual. It is very inconvenient and very distressing that two people should be husband and wife in one country and not husband and wife in another; that their marriage should be a lawful marriage in one and bigamous in another; that they should be compellable by the laws of a Christian country to a cohabitation which, by the laws of another Christian country, would be an adulterous intercourse. And if we could find in the general application of the law, as laid down by the American authorities, a satisfactory escape from the difficulty, we should be sorely tempted to strain the construction of the English statute to bring it into harmony with that law. But I do not find any such satisfactory solution in that law. In the first place it appears to me to be a violation of every principle to make the dissolubility of a marriage depend on the mere will and pleasure of the husband, and domicile is entirely a matter of his will and pleasure. It would be very desirable, no doubt, that a judicial decree of dissolution of a marriage affecting the status of husband and wife, a decree *in rem*, should be, if possible, recognised by the courts of every other country, according to the principles of international comity. But is such a result possible? Would any French court recognise the dissolution of a French marriage because the French husband had been minded to establish his domicile in England?

In England a divorce *a vinculo* is only granted under certain conditions, and with very careful precautions and stringent regulations to prevent its being the result of collusion between the parties. But supposing the collusion to assume the form of an abandonment of the English domicile, and the establishment of a new domicile in some country where a divorce can be obtained, almost if not quite, by mutual consent and arrangement? Would an English court, or ought it to recognise such a dissolution of the marriage tie, and allow the English wife, whose original domicile would be restored thereby, to return to this country and contract a valid marriage here? Moreover, a dissolution of the marriage for adultery is only

one of the modes by which the status or alleged status of husband and wife is judicially determined. A decree of nullity of a pretended marriage is quite as much a decree *in rem*, and has all the consequences. How would it be possible to make domicile the test of jurisdiction in such a case? Suppose the alleged wife were the complainant, her domicile would depend on the very matter in controversy. If she was really married, her domicile would be the domicile of her husband; if not married, then it would be her own previous domicile. If domicile is required to give jurisdiction, that requisite could not be supplied by the negligence or consent of the party; and a decree for dissolution would always be liable to be opened by a fresh litigation raising the question—often a most difficult question—of the domicile.

I find myself unable to arrive at the conclusion that the domicile of the complaining party ought to determine the existence of the limits of the jurisdiction given by the English statute to the English court. The only limitation which I can find is the limitation of the jurisdiction to those matters which come under the category of matrimonial matters in England, to every one of which the English law, with all its consequences, so far as England is concerned, must be applied. I have endeavored to ascertain what such a matter is, and I have arrived at the conclusion that the present case comes within that category. It is a misfortune that that law with its consequences may not be recognised in another country, but that misfortune inevitably arises from an irreconcilable conflict of laws produced by the irreconcilable views of different Christian communities as to the dissolubility or indissolubility of the marriage tie, or the sufficiency of the grounds for a dissolution. I do not think that I am overruling any English case in holding that on the facts stated in this petition the wife is entitled to the relief she asks, or in laying down that where and while the matrimonial home is English, and the wrong is done here, then the English jurisdiction exists and the English law ought to be applied.

Protest overruled and action remitted.

COTTON, L. J., concurred. BRETT, L. J., dissented.

The Act of Parliament (20 & 21 Vict. c. 85), under which the present Divorce Court in England was constituted, transferred to it all jurisdiction formerly vested in the ecclesiastical

courts, and was passed expressly to "constitute a court with exclusive jurisdiction in matters matrimonial in England." It should be borne in mind that the former ecclesiastical courts

were purely spiritual courts, and previous to the reformation, were but part of an universal system, emanating from the See of Rome, the ultimate appeal from which was to Rome itself. The canon law was the law administered. Hence, no divorce *a vinculo*, but merely *a mensa et thoro*, was permitted, and such continued to be the case up to the passing of the present Divorce Act. Previous to that time nothing short of a private Act of Parliament, which is itself a special piece of legislation, could dissolve a marriage, and even that legislative act was never resorted to prior to the Reformation, after which event all the Pope's jurisdiction in matters ecclesiastical was transferred to the king, but even that did not embrace the right to grant a divorce *a vinculo*. The appeal from the Ecclesiastical Courts lay henceforth to the king, who exercised that authority through a committee or house of delegates, whose jurisdiction was subsequently conferred on the judicial committee of the Privy Council, and eventually by the 56th sect. of 20 & 21 Vict. c. 85, was transferred to the House of Lords. From the very nature and origin of the spiritual courts, they were open to all who were resident in the respective dioceses, into which England was divided—every bishop having his court, presided over by his chancellor, and the law administered being the canon law of Christendom, or the universal law of the Latin church. Originally then, there were no conflicting laws on the subject of marriage and divorce existing in different countries, and hence the question of domicile was immaterial; but as various countries modified or varied the rule of the canon law, the question of domicile gradually assumed a greater importance. But as in England the spiritual courts never claimed to exercise the power of granting a divorce *a vinculo matrimonii*, residence in the diocese was deemed sufficient for

the ancient jurisdiction exercised by them in matrimonial matters, viz., that of decreeing what is now termed a judicial separation. The modern Act of Parliament having, however, constituted an entirely original tribunal, having power to decree a dissolution of the marriage itself, it becomes a serious consideration, whether domicile is not absolutely necessary to give such a court jurisdiction, at all events in relation to divorces *a vinculo*, the grounds for such divorces differing in different countries, and some even disallowing such a divorce altogether. This would seem especially the case where the marriage itself has been contracted in a foreign country, and the object sought is to set aside that contract. The *lex loci* of the contract must be respected, and all the rights and duties incident to it, should be enforced by the municipal laws of the country in which the parties happen to be resident, even though not domiciled. Such is only international comity. Even a judicial separation is perfectly compatible with the relief to which a temporary resident may be entitled, but to affect wholly to dissolve a foreign marriage, which perhaps is indissoluble in the country where it was contracted, without first requiring that the applicant should become domiciled, or in other words, should have evidenced his voluntary intention *exuere patrium*, would scarcely be in accordance with the comity of nations, or with that reciprocity which the true spirit of the *jus gentium* demands.

In Scotland, the spiritual courts have been long since swept away, in fact ever since the disestablishment of the Episcopal Church, and the transfer of their jurisdiction to the Court of Session, where the civil, not the canon law, was accepted. The law of divorce being no longer regulated by the law of the church, and divorces *a vinculo* being permitted upon various grounds in

Scotland, may probably explain the requirement of domicile in divorce suits instituted in the Scotch courts.

The Scotch law in this branch of jurisprudence, being *sui generis*, and differing from the general law of Europe, including England, would naturally insist upon domicile to give their courts jurisdiction over foreigners in a matter of such a peculiar and exceptional character as divorce. Their *special* and exceptional jurisdiction would of itself necessitate a special domicile. But we see in the case of Solley, where a man married in England, but divorced in Scotland, and remarried in England, was nevertheless convicted of bigamy in England and sentenced to transportation, how seriously the Scotch law might, at times, conflict with that of England. But yet in that case the conflict arose rather out of the doctrine then held in England of the indissolubility of marriage, except by a special Act of the Legislature, than out of the application of the doctrine of domicile. The English spiritual courts were still clinging to the doctrine of the Roman Church on the subject of marriage. The canon law, the common law of Christendom previous to the Reformation, was still their rule of faith; in one word, the English canonists were at variance with the Scotch covenantors. Between the two, poor Solley was sacrificed. But now that matters matrimonial in England are taken out of the jurisdiction of the spiritual courts, and divorces *a vinculo matrimonii* are granted by a purely secular court, no longer necessitating a special legislative interposition, the canon law in such suits being abrogated, and a jurisdiction *sui generis* established, under which divorces are decreed upon principles and evidence such as the ancient canon law of Europe wholly repudiated, a domicile in the country seems essential to give such a court jurisdiction over marriages contracted in a foreign country, and to

afford a *locus standi* to a suitor demanding that the foreign contract be rescinded. The recognition of the foreign contract, as has been before observed, is a matter of international obligation requiring no domicile either to constitute, establish or enforce, but its dissolution upon certain grounds which each country prescribes for itself, irrespective of any general international agreement or comity, surely demands a domicile, either of "origin" or "by operation of law," to entitle the applicant to prosecute his suit; and indeed such requirement is only consistent with respect for the jurisdiction of the original contract. The decision before us, of the Lords Justices of Appeal, is one of great international importance, and will doubtless be reviewed by the House of Lords, where, in addition to the law Lords, the House will have the able assistance of the common-law judges to enable them to arrive at a satisfactory conclusion on a matter of such vital interest. In the interim, it may not be altogether unedifying if we presume even to anticipate their lordships' judgment, by the aid of cases though not altogether analogous, yet essentially connected with the matrimonial law of England.

Although no domicile, in the legal acceptance of that term, is required to make a contract of marriage, the question is whether a legal domicile in England is necessary to create a jurisdiction for dissolving a marriage contracted in a foreign country, or even for granting a judicial separation. Some observations of Lord BROUGHAM, in delivering the judgment of the House of Lords in *Warrander v. Warrander*, 2 Cl. & Fin. 488, may possibly throw some light upon this subject. "A marriage," says his lordship, "good by the laws of one country is held good in all others where the question of its validity may arise; for the question always must be, did the parties intend to contract marriage? *

* * All that the courts of one country have to determine is, whether or not the thing called marriage, that known relation of persons, that relation which those courts are acquainted with and know how to deal with, has been validly contracted in the other country where the parties profess to bind themselves. If the question is answered in the affirmative, a marriage has been had, the relation has been constituted : and those courts will deal with the *rights* under it according to the principles of the municipal law which they administer.

“ But it is said that what is called the essence of the contract must also be judged of according to the *lex loci contractus* ; and as this is a somewhat vague, and for its vagueness a somewhat suspicious proposition, it is rendered more certain by adding that dissolubility or indissolubility is the essence of the contract. Now I take this to be really *petitio principii*. It is putting the very question under discussion into another form of words, and giving the answer in one way. If it is said that the parties marrying in England must be taken all over the world to have bound themselves to live until death or an Act of Parliament ‘them do part,’ why shall it not be said also that they have bound themselves to live together on such terms, and with such mutual personal rights and duties as the English law recognises and enforces ? Those rights and duties are just as much of the essence as dissolubility or indissolubility ; and yet all admit, all must admit, that persons married in England, and settled in Scotland, will be entitled only to the personal rights which the Scotch law sanctions, and will only be liable to perform the duties which the Scotch law imposes. Indeed, if we are to regard the nature of the contract in this respect as defined by the *lex loci*, it is difficult to see why we may not import from Turkey into England a marriage of such a nature as that it is capable of being

followed by, and subsisting with another, polygamy being there the essence of the contract. * * * Indeed, another consequence would follow from this doctrine, of confounding with the nature of the contract that which is only a matter touching the *jurisdiction* of the courts, and their power of dealing with the rights and duties of the parties to it. If there were a country in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing *in pais* to separate, every country ought to sanction a separation *in pais* there, and uphold a second marriage contracted after such a separation.”

The learned lord, speaking for the House of Lords, draws a distinction between the incidents and the essence of the marriage contract. “ The fallacy of the argument that indissolubility is of the essence of the marriage contract, appears plainly to be this : It confounds incidents with essence ; it makes the right under a contract, or flowing from and arising out of it, parcel of the contract ; it makes the mode in which judicatures deal with those rights, and with the contract itself, part of the contract, instead of considering, as in all soundness of principle we ought, that the contract and all its incidents, and the rights of the parties to it, and the wrongs committed by them respecting it, must be dealt with by the courts of the country where the parties reside, and where the contract is to be carried into execution.”

Although Lord BROUGHAM is, as usual, verbose, his meaning is, perhaps, best discovered in the following sentence, forming part of the judgment, and which is more terse than his usual style. In this case of *Warrender v. Warrender*, there had been a mutual separation, but not by deed. Alluding to this, his lordship says : “ I am of opinion there is nothing in the separation, supposing it had been ever so formal and ever so full in its provisions, which can by law

displace the presumption of *domicile* raised by the marriage, and subsisting in full force so long as the marriage endures."

If domicile is not required in order to give the courts jurisdiction, then it would appear that the law of the *lex loci contractus* must be introduced into the question of dissolubility or indissolubility, equally as it is accepted in judging of the validity of the marriage itself. "At all events," says Lord Brougham, "this is clear, and it seems decisive of the point, that if, on some such ground as this, a marriage indissoluble by the *lex loci* is to be held indissoluble everywhere, so, conversely, a marriage dissoluble by the *lex loci* must be held everywhere dissoluble. The one proposition is, in truth, identical with the other. Now it would follow from hence, or rather it is the same proposition, that a marriage contracted in Scotland, where it is dissoluble by reason of adultery, or of non-adherence, is dissoluble in England, and that at the suit of either party. Therefore, a wife married in Scotland might sue her husband in our courts for adultery, or for absenting himself four years, and ought to obtain a divorce *a vinculo matrimonii*. Nay, if the marriage had been solemnized in Prussia, either party might obtain a divorce on the ground of incompatibility of temper; and if it had been solemnized in France during the earlier period of the revolution, the mere consent of the parties ought to suffice for dissolving it."

Such appear to be some of the difficulties attending the dispensing with the domicile of the parties in the country where the divorce is sought. The marriage having been contracted abroad, must be judged of by the *lex loci contractus*. No domicile having been acquired in the country where the divorce is sought, and the marriage contract being not an ordinary contract, but forming part of the *jus gentium*, the dis-

solution of the contract must be governed by the same *lex loci*. It is one thing for the country in which the divorce is sought to deal with the rights of the parties under the contract, according to the principles of its own municipal law, and quite another thing to dissolve or vary the contract itself upon the grounds of its own statutable municipal jurisdiction, without first requiring of the parties the *status* of domicile. But to import into its courts the *lex loci* relating to the dissolution or even modification of the original contract would amount to little short of the usurpation of the jurisdiction of a foreign country, in a matter that is not of an international character. In *Pitt v. Pitt*, 4 Macq. H. L. Cas. 627; 10 Jur. N. S. 735, it was held that the husband, who in 1860 had commenced proceedings in the Scotch courts for a divorce on the ground of adultery, had not acquired a Scotch domicile, and therefore the Court of Session had no jurisdiction. In the same case it was questioned whether a mere domicile of origin, or whether actual "habitation," or domicile by choice, is sufficient to confer jurisdiction on the court; but the profession of a domicile of one kind or another in the country where relief was sought, was considered beyond question.

And further, if, as in this same case, the husband goes away to avoid his creditors, leaving his wife behind, his wife cannot be compelled to become subject to the tribunal of that country in which her husband acquires a fresh domicile: *Pitt v. Pitt*, *supra*.

The domicile must be a *bona fide* one. So much so that even after the wife (who was living apart from her husband) had instituted a suit in the Scotch courts for a divorce, on the ground of the husband's adultery, it was decided she had no power as a married woman to acquire a fresh domicile: *Dolphin v. Robins*, 29 L. J.; P. M. & A. 11. In the case before us, the plaintiff, an English-

woman, had married a Frenchman at Gibraltar in 1856, one year before the passing of the present English Divorce Act. At the time the suit was commenced by the wife the husband, though resident in England, had acquired no legal domicile there, and the wife cannot acquire a domicile for herself, though her husband may have been guilty of such misconduct as would furnish her with a defence to a suit by him for a restitution of conjugal rights: *Yelverton v. Yelverton*, 1 Swab. & Trist, 585; *Whitcombe v. Whitcombe*, 2 Curties 351. A divorce granted in England might not hold good in the country of her husband's domicile, and she might be placed in the anomalous position of remaining a wife in the country of her husband's domicile, and of being a divorced woman in the country where he had no domicile. On the other hand, were she domiciled in the country where the divorce was obtained, the country where the original contract of marriage was effected might acknowledge (we do not say it would) the efficacy of a divorce obtained in the country of his acquired domicile, although it might have been granted upon grounds such as would not have been sufficient in the country where the marriage was contracted. At all events the want of domicile in the former country would surely seriously interfere with any recognition of the dissolution of a marriage contracted in the country in which both husband and wife still remained domiciled. It is at all events desirable to bear in mind that the *lex loci* of marriage is recognised all over the world, although where the *lex loci* is such that persons of a particular religious faith cannot avail themselves of it, or the difficulties of obtaining a marriage conformable to the *lex loci* are either insuperable or unreasonable, the converse of the proposition is not, in all cases, and under all possible circumstances, established: *Ruding v. Smith*, 2 Hagg. Cons. Rep. 382.

On the other hand divorce, not being an international institution, but on the contrary being expressly disallowed even in some Christian countries, France for instance, as indeed it was at one time unknown throughout Christendom, the *lex loci* is not necessarily recognised, especially where the parties are not domiciled in the country where the divorce is sought.

It seems unreasonable that in the case before us, where the husband's nationality precludes a divorce in his own country, that without naturalization or even acquired domicile in another country he should be subjected by a foreign country to that which the laws of his own country refuse to recognise. Upon the whole we think the opinion of Lord Justice BRETT, to the effect that the general words employed in the English Divorce Act, viz., "matters matrimonial in England" should be confined to matrimonial matters arising between parties domiciled there; and such if we mistake not, will probably be the opinion of the House of Lords should the case be carried up, as to all appearance it must, to that tribunal. In *Warrander v. Warrander*, Lord BROUGHAM is reported to have said: "The resolution in *Solley's case*, was, that an English marriage could not be dissolved by any proceeding in the courts of any other country for *English* purposes; in other words, that the courts of this country will not recognise the validity of a Scotch divorce, but will hold the divorced wife dowable of an English estate, the divorced husband, tenant thereof by curtesy, and either party guilty of felony by contracting a second marriage in England * * *. As there would be nothing legally impossible in a marriage being good in one country which was prohibited by the laws of another; so, if the conflict of the Scotch and English law be complete and irreconcilable, there is nothing legally impossible in a divorce being valid in the one country

which the courts of the other may hold to be a nullity. * * *

"We are now sitting as a Scottish Court of Appeal, this case coming thence to us, and as such we must be guided by a reference to the principles of the law of that country. In English cases, on the contrary, we sit as an English Court of Appeal, and must equally be guided by the spirit of the laws prevailing here."

In the same case, Lord LYNTHURST said, "The main question in the appeal is whether it is competent for the courts, on proof or admission of adultery, to pronounce a decree of divorce in a marriage contracted and solemnized in England * * *."

"My mind is satisfied that it is the law of Scotland that the courts there have without reference to the country where the marriage was contracted, been used from a very remote period to pronounce sentence of divorce for adultery."

Although in *Warrender v. Warrender* the marriage had taken place in England, yet the husband was a domiciled Scotchman, and sued for a divorce in Scotland, and, as was said by Lord LYNTHURST, "the basis of the whole case" was that he was a Scotchman domiciled in Scotland. Though married in England to an English woman, the adultery committed in France, the divorce suit instituted in Scotland, it was held by the House of Lords that it is competent, under such circumstances, to the Scotch courts to entertain a suit to dissolve a marriage contracted in England. The domicile, however, was "the basis of the whole case." This case occurred A. D. 1835, nearly a quarter of a century before the passing of the present English divorce act, and although mention is made in that act of "domicile," the question is whether it must not be assumed, in the absence of anything in the act to the contrary, that the same rule should henceforth prevail in Eng-

land as that which prevails in Scotland, not *because* it prevailed in Scotland, but because the matrimonial courts were no longer, in either country, ecclesiastical or spiritual courts, having jurisdiction over the consciences of all resident within episcopal dioceses, but temporal courts authorized to decree that to which the spiritual courts had no claim, viz., a dissolution of the very sacrament of marriage.

To recur to *Solley's case*, reported in Russ. & Ryan's C. C. 237, and which arose A. D. 1812, both parties were English and domiciled in England. This case was referred to by Lord BROUGHAM when giving judgment as Lord High Chancellor of Great Britain, in *McCarthy v. DeCraiz*, mentioned in *Warrender v. Warrender*, where his lordship laid it down that an English marriage could not be dissolved or affected by a Danish or other foreign divorce. But upon this case being quoted by Lord LYNTHURST, in *Warrender v. Warrender*, Lord BROUGHAM added: "I think that this judgment (*Warrender v. Warrender*) does not break in on *Solley's case*. This is a decision in reference to the law of Scotland, a judgment founded on which we now, as a Court of Appeal, confirm. *Solley's case* refers to the law of England."

In *Pitt v. Pitt* (A. D. 1864), before referred to, the jurisdiction of the Scotch court to grant a divorce *a vinculo* was dependent upon the respondent, who was an Englishman, having acquired a *bona fide* domicile in Scotland; "a complete domicile in Scotland, and had thereby put off and lost his original domicile in England." (Per Lord Chancellor, on the hearing of that appeal.)

"The respondent's case," said Lord CHELMSFORD, on the same occasion, "depends, as his counsel admits, upon the establishment of this complete legal domicile."

It also appears from *Mrs. Bulkeley's*

divorce case that the French law recognises foreign divorces among foreigners married abroad, although divorces *a vinculo* are prohibited in France itself by an act of the legislature of 1816, upon purely social and not upon any fanciful ecclesiastical or spiritual ground; but the divorce must be obtained from the court of the domicile, i. e., the country, not necessarily of origin or birth, but of actual domicile. In such case the foreigner so divorced may contract another marriage in France itself and with a French person. (See report of this case in the judgment of the Court of Cassation, together with a letter from M. Troplong, president of the court: 4 Macq. H. L. Rep. 648.

According to this French case a divorce even of English people, granted by an English court of divorce, would not be recognised in France, so as to entitle the parties to marry again, unless they had been domiciled in the country where the divorce was granted.

This of itself is sufficient to insure a mature reconsideration of the decision of the Court of Appeal, in the case of *Niboyet v. Niboyet*, especially as so high an authority on international law as Sir R. PHILLIMORE, the judge of the English Divorce Court, agreed with Lord Justice BRETT on the necessity of domicile to give the court jurisdiction in the case of a foreigner or the English wife of a foreigner suing for either a judicial separation or an absolute divorce. As the case at present stands, two judges are of one opinion and two of another. For the reasons before mentioned domicile might well be dispensed with in the case of a judicial separation, though required in the case of an absolute divorce. The Scotch cases, also, before referred to, appear to favor the view of domicile being requisite to give the Scotch courts jurisdiction in a suit for

an absolute divorce; and the American law is acknowledged, as admitted by Lord Justice JAMES, to determine the jurisdiction by the domicile of the party at the time of the complaint. It seems, therefore, somewhat unreasonable that the English court, by dispensing with the requirement of domicile, should add another to the many conflicts of laws between nations, because no mention is made of domicile in the Act of Parliament creating the modern divorce court; and it is scarcely logical to infer that because residence alone in a diocese, when the spiritual court of each individual bishop exercised a local jurisdiction, was deemed sufficient for the purpose of granting a divorce *a mensa et thoro*, that, therefore, now that such spiritual jurisdiction is abolished, and a court of a temporal character is established, with full power to grant absolute dissolutions of the marriage contract (a power never claimed by the spiritual court), it should be governed by the same qualification with respect to jurisdiction, especially when other nations cannot recognise such a principle. It requires no further argument to evidence that what might well be sufficient in a case of a mere separation from bed and board, might be deemed, in an international point of view especially, wholly insufficient in the case of an absolute dissolution with power to marry again, whereby such serious social relationships are severed, and perhaps new ties, with their almost inevitable complications, created. The present decision, if upheld, would convert the English Divorce Court into a refuge for transient visitors, who might thus be tempted to place themselves in the anomalous position of being divorced in England to find themselves still married when at home.

HUGH WRIGHTMAN.

High Court of Justice, Exchequer Division.

DAVEY v. SHANNON.

An agreement not to set up a certain business during the joint lives of the parties to the agreement, is an "agreement that is not to be performed within the space of one year from the making thereof," within the meaning of the 4th section of Statute of Frauds.

DEMURRER to part of a statement of defence.

The statement of claim was in the following terms:

1. The plaintiff is an outfitter and tailor, carrying on business in Devonport.

2. In October 1866, the defendant entered into the employment of the plaintiff as a foreman tailor, for a term of three years, on the terms, amongst others, that if he should leave the plaintiff's employment he should not engage in the service of any one carrying on, or himself carry on, the business of a tailor or outfitter within five miles of Devonport aforesaid.

The defendant, on the expiration of the said period of three years, continued in the employment of the plaintiff, on the like terms, except as to the period of employment, until the end of October 1877.

4. About the end of October 1877, the defendant left the plaintiff's employment, and shortly afterwards commenced to carry on business as a tailor and outfitter in Fore street, Devonport, being the same street in which the plaintiff carries on his said business; and he has since continued and still continues to carry on such business at the place aforesaid, contrary to the terms of the said contract; by reason whereof the plaintiff has been, and will be, injured in his said business and deprived of custom and of profits which he would otherwise have obtained.

The plaintiff claimed an injunction and damages.

The 4th paragraph of the statement of defence was as follows: "The defendant says that neither the alleged contract of employment, nor any memorandum or note thereof, was or is in writing signed by the defendant or any other person by him lawfully authorized; and the defendant relies on the statute, commonly known as the Statute of Frauds, as affording a defence to this action, on the ground that the alleged contract was an agreement not to be performed within the space of one year from the making thereof."

To this paragraph the plaintiff demurred.

A. Charles, Q. C., for the defendant.—*Prima facie*, this agreement is to last for the lives of the parties, and therefore it is not to be performed within a year from the making: *Ely v. The Positive Government Security Life Assurance Company*, Law Rep. 1 Ex. D. 20; *Dobson v. Collis*, 1 H. & N. 81; *Knowlman v. Bluett*, Law Rep. 9 Ex. 1; affirmed in the Exchequer Chamber, Law Rep. 9 Ex. 307; *Sweet v. Lee*, 3 M. & G. 452; *Roberts v. Tucker*, 3 Ex. 632.

Anstie, for the demurrer.—This is not an agreement which need be in writing in order to satisfy the Statute of Frauds. It is an agreement which may possibly be performed within the year, for there is no presumption of the continuance of any life beyond the space of a year. [HAWKINS, J.—If a servant be hired for a term of five years, the death of that servant is an event which may possibly happen within the year, and which would, of course, determine the service.] The case of *Ely v. The Positive Government Security Life Insurance Company* is no doubt against the plaintiff, but it stands alone; the cases on the subject were not fully cited on the argument, and in the Court of Appeal, Law Rep. 1 Ex. D. 58, the court expressly refused to decide the case on the ground of the Statute of Frauds. There are many cases in favor of the plaintiff's contention: *Peter v. Compton*, Smith's Leading Cases, 7th ed., vol. 1, p. 335; *Fenton v. Emblers*, 3 Burr. 1279; *Ridley v. Ridley*, 13 W. R. 763; *Wells v. Horton*, 4 Bing. 40; *Gilbert v. Sykes*, 16 East 150; *Souch v. Strawbridge*, 2 C. B. 808; *Murphy v. O'Sullivan*, 11 Ir. Jur. N. S. 111; *Farrington v. Donohue*, Ir. R. 1 C. L. 675, is distinguishable, inasmuch as the continuance of the arrangement for a longer period than one year was clearly indicated.

A. Charles, Q. C.—This is not a case where any presumption of the continuance of life is necessarily set up; it is merely a question of the intention of the parties. They clearly intended the arrangement to last over a longer period than one year: *Boydell v. Drummond*, 11 East 142, is in my favor.

HAWKINS, J.—I am of opinion that the contracts fall within the 4th section of the Statute of Frauds, as agreements "not to be performed within the space of one year from the making thereof." Upon the first contract for three years it is impossible to raise a doubt. The case, however, has been argued as though it rested

upon a new contract of employment for an indefinite period, after the expiration of the three years, and an agreement on the defendant's part never after that employment should cease to set up business as a tailor or outfitter within five miles of Devonport. As thus presented, I have considered the case.

The law upon the subject is now well established. A contract which, according to its terms, is *prima facie* not to be performed within a year, is not the less within the statute because it is made defeasible by a contingency which may occur within that period. Thus a contract of service for two years is none the less within the statute because it is made determinable by the death of either of the parties, or by notice, or by the misconduct of the servant at any period of the service. *Dobson v. Collis* is an express authority to this effect. *Roberts v. Tucker* is a striking authority in support of the same doctrine. That was an action by a stipendiary curate against the incumbent of a parish, founded upon an alleged promise made by the defendant to the plaintiff "to take all necessary measures for obtaining the payment of an annual grant from the Society for Promoting the Employment of Additional Curates, in each and every year," &c. At the trial before Mr. Justice COLTMAN he nonsuited the plaintiff, upon the ground that the contract fell within the 4th section of the Statute of Frauds. On motion to set aside the nonsuit, Baron PARKE and Baron ALDERSON upheld the ruling, the latter saying, "The case of a defeasible contract, where the contract may be defeated or put an end to within the year, is not for that reason taken out of the operation of the Statute of Frauds." *Sweet v. Lee* further illustrates the same now well-recognised proposition. There the contract was for an annuity for life, and the court held it to be within the 4th section, though it might, by the death of the annuitant, be terminated at any time. Upon the same principle, in *Farrington v. Donohue*, it was decided that a verbal agreement to maintain a child aged five years until she was able to do for herself, was within the statute, although the child might die within a year, for it was clear that, if she lived, the contract was not to be—that is, could not be—in the contemplation of anybody, performed within that period. The same view was taken by this court in *Ely v. The Positive Assurance Company*, where it was held that the engagement of the plaintiff as solicitor to the company during his whole professional life, and so long as the defendants continued a company,

was a contract not to be performed within a year, though it might be determined by the death or resignation of the plaintiff himself, or by his dismissal for his misconduct within that period.

On the other hand, a contract which *prima facie* and from its terms may be performed within a year, however improbable that it will be so, and even though the parties at the time of making it expected its endurance beyond that period, does not fall within the statute, and it is immaterial that the performance of it is, by the natural course of events, delayed for a much longer period. The most familiar illustration of this proposition is the case of a servant hired generally, whose service may be determined by reasonable notice at any time. Such a contract does not fall within the statute, though the service may continue and the contract remain untermi-nated for many years: *Beeston v. Collyer*, 4 Bing. 309. *Fenton v. Emblers* well illustrates the law in this respect. That was an action brought by the plaintiff against the executor of a person named May, upon a promise of May, by his last will and testa-ment to give and bequeath to the plaintiff a legacy or annuity of 16*l.* by the year, to be paid and payable to her yearly and every year from the day of the decease of the said May for and during the term of her natural life. It was objected that this agreement was within the 4th section of the Statute of Frauds, and ought to have been in writing, for that it was not to be performed within a year, since a whole year from May's death was to elapse before the annuity would become payable. It was answered, however, that the action was brought for May's not having done what he ought to have done in his lifetime, viz., made his will, which might have been done within the year. Mr. Justice DENISON said: "The statute does not extend to cases where the thing may be performed within the year," and Mr. Justice WILMOT said: "The statute only extends to such promises where, by the express appointment of the party, the thing is not to be performed within a year." See also *Ridley v. Ridley*. *Souch v. Strawbridge* was an action for the maintenance of a child placed by the defendant in 1842 under the care of the plaintiff, upon an agreement to pay 5*s.* per week, or one guinea per month, until the defendant gave notice, or as long as the defendant should think proper. The child remained with the plaintiff until 1845. The Court of Common Pleas held that the case was not within the statute, for there was no certain time fixed for the duration of the contract, but it was to endure for an indefi-

nite period, subject to be put an end to at any time at the option of the defendant, and that contingency might defeat the contract within a year. Upon the same principle *Knowlman v. Bluett* was decided in this court. There the contract was that the plaintiff should take charge of seven illegitimate children, of which the defendant was the father, and that the defendant should give her 300*l.* a year, payable quarterly, to keep them. The court held the case not to be within the statute, for the reason given by Mr. Baron BRAMWELL, namely: that "the sum may be called an annuity, but really the engagement was not binding on either party for any definite space of time," and that the defendant might at the end of any quarter have refused to provide for the maintenance of the children any longer, and in like manner the plaintiff might have declined to take charge of them. The contract might have been performed within the year, though no doubt both parties expected it would last longer. This judgment was appealed against; but the appeal was disposed of upon another ground.

In the case now before us, the contract set out in the statement of claim amounts to an agreement on the defendant's part not to set up the trade of a tailor or outfitter within five miles of Devonport, during the joint lives of himself and the plaintiff. *Prima facie*, therefore, it was not to be performed within a year, and therefore falls within the operation of the 4th section of the Statute of Frauds. My judgment, therefore, is for the defendant.

The inclination of the American courts is quite adverse to the construction of the statute adopted in the foregoing case. With us the phrase a contract "not to be performed," has generally been considered to mean a contract which *cannot*, and not merely one that *may not* be performed within a year; a contract which it will be, and always must be absolutely impossible to perform in that time, and not merely one which both parties expect *may not* be so accomplished; a contract which *must* continue over a year, and not merely one which *may* embrace many years. The fact that it extends through many years before its accomplishment, is not decisive that it is within the statute. The question still is, was it a con-

tract which, at the time of making, clearly could not and must not be performed within that time. It is not that looking backwards, we see that the contract has not been fulfilled in a year, but whether looking forward from the time of making, we could then say it was *not to be* performed.

It is immaterial what is the *maximum* time of possible duration, as expected by the parties, but the question is, what is the *minimum* time, within which it *can be* performed. Is that more than a year? The criterion is not whether the promisor has the right by the terms of the contract, if he chooses, to perform it within many years, but whether the promisee has no right to demand, and can not receive full performance within

one year. In the last case the contract must always be within the statute, in the other it may not be. But all this is elementary.

Perhaps this view is more obvious, when the contract itself contains on its face a clause which shows that it may be performed within a year, although it may continue much longer. Thus, on a contract to labor for a company "for the term of five years, or so long as A. shall continue to be the agent of the company," it was held that the statute did not apply, and that the legal effect of the contract was to serve so long as A. should be the agent of the company, not to exceed five years in all. And as possibly A. might not continue more than a year, the contract might be performed within that time; or it might not, but as it might, it could not be called a contract, which *was not* to be performed in that time: *Roberts v. Rockbottom Co.*, 7 Met. 46 (1843).

For a similar reason, a contract by R. to print goods for H. at cost, "two years or longer, if necessary, until H. shall make \$50,000," is not within the statute, since possibly, so far as the terms of the contract indicate, H. might make the \$50,000 in one year, although most probably he would not: *Hodges v. Richmond Man. Co.*, 9 R. I. 482 (1870).

So in *McLees v. Hale*, 10 Wend. 428 (1833), the defendant had only agreed with the plaintiff to support a certain child, then about six months old, until it should be five or six years old, "or so long as the child should be chargeable to the town of Greenfield," of which the defendant was an overseer; and it was held not within the statute by reason of the contingency, as the child might not continue chargeable to that town for a year, or even a month.

And if this construction be correct, when the contract *upon its face*, contains a clause or condition by which it may be fulfilled within a year, it is argued, why may it not be also true, where a similar condition or clause is implied by

law. In the latter, the contract may be said to be as much *legally* performed as in the former.

Thus it was held in *Peters v. Westborough*, 19 Pick. 364 (1837), that an oral contract to support a person, then only twelve years old, "until she was eighteen," was not void under the statute, since it would have been fully performed at her death, which might have occurred within a year from the time of making; and that in order to bring a parol agreement within the statute, it must have been expressly stipulated by the parties, or it must appear to have been understood by them, that the agreement was not to be performed within a year, which stipulation or undertaking must be absolute and certain, and not dependent upon any contingency.

Precisely similar are the cases of *Hutchinson v. Hutchinson*, 46 Me. 154 (1858); *Wiggins v. Kizer*, 6 Ind. 252 (1855); *Dresser v. Dresser*, 35 Barb. 573 (1862); *Heath v. Heath*, 31 Wis. 223 (1872); *Bull v. McCrea*, 8 B. Mon. 422 (1848); *Howard v. Burgen*, 4 Dana 137 (1836); *Ellicott v. Peterson*, 4 Md. 476 (1853); *Murphy v. O'Sullivan*, 11 Irish Jur. N. S. 111 (1866), an excellent case on this subject.

In some of these cases the contract was to support a person "for life;" in others for a stated term of years; but in all it was thought that the death of the party to be supported would terminate all liability under the contract, and so it might be performed within a year; and no distinction was made between the two cases. Whereas, in *Farrington v. Donohoe*, 1 Irish C. L. R. 679 (1866), it was said there was a material difference; that the one was within the statute and the other not.

But so long as the legal force of the contract can extend only during the life of some person, although it nominally extends through a period of years, which may be much longer than such life, there seems to be no more reason for considering the contract within the

statute, than if the contract had been expressed to be simply "for the life" of such person; to which all agree the statute does not apply. For such an agreement is similar to a contract to pay money, or leave the promisee a legacy, at the promisor's death; for though that event may not happen for many years, it may occur in one: *Fenton v. Emblers*, 3 Burr. 1278; *Kent v. Kent*, 62 N. Y. 560; *Riddle v. Backus*, 38 Iowa 81; *Frost v. Tarr*, 53 Ind. 390; *Jilson v. Gilbert*, 26 Wis. 637; *Updik v. Ten Broeck*, 32 N. J. L. 105; *Ridley v. Ridley*, 34 Beav. 478; *Wells v. Horton*, 4 Bing. 40; 12 Moore 176; *Thompson v. Gordon*, 3 Strobbh. 196.

For somewhat similar reasons a contract "not hereafter to engage in the staging or livery-stable business in S.," though unlimited as to time, was held not within the statute, since it would be in force and could continue only until the death of the defendant, and as that might happen within a year from the time of making the contract, it would then be fully performed, and so the statute did not apply: *Lyon v. King*, 11 Metc. 411 (1846); *Worthy v. Jones*, 11 Gray 168 (1858); *Blinding v. Sargent*, 33 N. H. 239 (1856); *Richardson v. Pierce*, 7 R. I. 330 (1862); *Hill v. Jamieson*, 16 Ind. 125 (1861); *Foster v. McO'Blenis*, 18 Mo. 88 (1853); *Blanchard v. Weeks*, 34 Vt. 589 (1861). And the same rule applies where the contract is express not to engage in a certain business for the next five years after making: *Doyle v. Dixon*, 97 Mass. 208 (1867).

These cases are certainly at variance with the views expressed in our principal case. The reason of them all seems to be that the contract may be fully performed within a year. It would be fully performed if the death of the party should occur within that time; no duties or obligations would be imposed upon the personal representatives of the promisor, or extend beyond his life, and therefore in a legal sense the con-

tract would be fully performed at his death.

The argument upon which some of these cases have been decided would seem to lead to the conclusion, that if A. orally agrees to work for B. for five years, this means five years, if he lives so long; and that if he should die within a year, the contract would be fully performed; and therefore that as by an implied contingency it might be performed within a year, it would not be within the statute; and so that A. would be liable to B. for breach of contract if he should refuse to work at all, or leave without good cause after having commenced. This conclusion seems a fair inference from the previous cases, unless the fact that in the latter the contract is positive to do a certain thing for a certain period, and in the other to refrain from doing it, makes a material difference. The argument, briefly stated, is this: A contract to labor for another "for the life" of the promisor is not within the statute. A contract to labor "for five years, or for the life of the promisor," is the same. In a contract to labor for another simply "for five years," the law annexes the condition that it is for the promisor's life only, and therefore the result should be the same, as if it had been expressed in the contract itself.

But the principle has never been extended so far; and it seems to be universally agreed or conceded, that a contract to labor for more than a year is within the statute, although there could be no liability upon the personal representatives of the promisor, for damages, if he should die within the time, and so not, in one sense, fulfil his contract. See *Bracegirdle v. Heald*, 1 B. & Ald. 727; *Drummond v. Burnell*, 13 Wend. 308; *Shute v. Dorr*, 5 Wend. 214; *Tuttle v. Lovett*, 31 Me. 655; *Kelly v. Terrell*, 26 Ga. 551; *Squire v. Whipple*, 1 Vt. 69; *Scroggin Blackwell*, 36 Ala. 351; *Emery v. Smith*, 46 N. H. 151; *Comes v. Lamson*, 16

Conn. 248; *Giraud v. Richmond*, 2 C. B. 335; *Snelling v. Huntingfield*, 1 C., M. & R. 20; *Nones v. Homer*, 2 Hilt. 116; *Amburger v. Marvin*, 4 E. D. Smith 393.

The reason is said to be that wherever the death of a person within a year merely *prevents* full performance, the case is within the statute; but if his death would leave the agreement completely performed, and its purpose fully carried out, it is not; for wherever the agreement can not be *completely performed* within a year, the mere fact that it may be *terminated*, or complete performance excused, or rendered impossible by the death of some person within a year, is not sufficient to take the contract out of the statute. The distinction is subtle, but it is real and well-settled.

The difference between the English and the American view seems to be what is the meaning of the word "performed." If by performance is meant, "forming through," carrying it all out, executing it through the whole stipulated period, then a clause or condition by which it might be terminated, rescinded, or revoked by either party within a year, would not save it from the operation of the statute, as was distinctly held in *Dobson v. Collis*, 1 H. & N. 81.

If, on the other hand, the party has a legal right, either by an express stipulation in the contract, or by operation of law, to put an end to the contract within a year, and does so, why is not the contract performed? The maximum time of the contract is not completed, to be sure, but the provision for an earlier termination of it, either by contract or by law, is as much a part of the original contract as any other, and therefore the whole contract may be said to be performed, accomplished, completed. In one sense of the word performance, the contract in *Peters v. Westborough*, 19 Pick. 364, to support a child "until he was eighteen years old" would not be

performed if he died at sixteen; that is to say, there was not a complete and full execution of the maximum obligation of the defendant; there was not a full performance in one sense of the word; but any longer or larger performance was excused, made impossible indeed, and therefore, in a legal sense, there might be a full and complete performance. It is not easy to reconcile this case with the English decisions referred to in our principal case; but it has fairly given tone and color to the American law, on this particular point.

It should not be forgotten, however, that a different view has sometimes been taken even in the American courts, and it has here been sometimes held that if the contract is by its terms *prima facie* to run for a term of years, it is within the statute, although it contain a clause by which it may be terminated within a year. The most notable of this class, perhaps, is that of *Packet Co. v. Sickles*, 5 Wall. 580 (1866). In this case Sickles agreed to attach a patented fuel contrivance to the Washington Steam Packet Co.'s steamboat, which the company were to use on their boat "during the continuance of the patent, if the boat should last so long; and pay therefor, weekly, three-fourths of the value of the fuel saved thereby." In fact the patent had, at the sale of the contract, twelve years to run; but nothing was said about that in the contract itself. It was held, that the contract was within the statute, notwithstanding it might not continue more than a year, by reason of the loss of the boat within that time; and the English cases of *Birch v. Earl of Liverpool*, 9 B. & C. 891; and *Dobson v. Collis*, 1 H. & N. 81, were principally relied upon.

In view of the conflicting opinions of eminent tribunals upon this question, it must be confessed the law is in a very unsatisfactory state upon this delicate point.

EDMUND H. BENNETT.

RECENT AMERICAN DECISIONS.

*Court of Chancery of New Jersey.*DEN BLAKER'S EXECUTRIX v. THE RECEIVERS OF THE
NEW JERSEY MIDLAND RAILWAY CO.

Negligence by a railroad company does not relieve a person attempting to cross its track from the duty of exercising ordinary care and prudence.

When a person is killed by collision with a locomotive, if it appears that his carelessness materially contributed to the disaster, his next of kin have no right to damages.

A person approaching a railroad crossing is bound to look and listen, and if he fails to do so and injury ensues, he is without remedy; or if, using his eyes and ears he sees or hears an approaching train, and foolishly tries the experiment of crossing in advance of it and fails, his failure will be esteemed his own fault.

ON petition for a remedy for damages alleged to have been sustained in consequence of death, where death was caused by negligence.

M. C. Gilham and Coffey, for petitioner.

C. B. Alexander, of New York, for receivers.

VAN FLEET, Vice-Chancellor.—The petitioner seeks to recover damages for the death of her husband. Her claim is made under the statute giving a remedy to the personal representatives of a person killed, where death is caused by the wrongful act, neglect or default of another; Rev., p. 294. She charges that the death of her husband was caused by the negligence of the employees of the receivers. The negligence imputed to them need not be particularized; it may be admitted to be sufficient to give her a right of action. The important question is, was not the person killed also guilty of negligence, to such an extent as to deprive his next of kin of any right to damages? In cases of this class, the court is not at liberty to measure or compare the faults of the parties to see which is most faulty, and then compel the most culpable to make compensation to the other. Negligence by one party does not relieve the other from the duty of exercising ordinary care and prudence. In this case, it may be conceded that the employees of the receivers were grossly careless, yet, if it appears that the deceased was also careless, and his carelessness materially contributed in producing the collision which resulted in his death, or was the proximate cause of it, his next of kin have no right to damages: *Drake v. Mount*, 4 Vr. 445; *Harper v. Railway Co.*, 3 Id. 90; *Baxter v.*

Troy & Boston Railroad Co., 41 N. Y. 461; *Wilcox v. Rome & Watertown Railroad Co.*, Id. 358; *Railroad Co. v. Houston*, 5 Otto 702.

Mr. Den Blaker, the petitioner's testator, was killed June 12th 1876, while attempting to cross the track of the Midland Railway, on a public highway, known as Midland Avenue, in the county of Bergen. The railway at this crossing is built in a cut, which, at the crossing, is about four feet deep, and increases in depth as it extends westward, until it reaches a depth of twelve and a half feet above the top of the rails. The length of the cut from its western extremity to the crossing, is five hundred and eighty-four feet. Midland avenue, as it approaches the railway from the north, is also built in a cut for a distance of one hundred and thirty-five feet, and descends to the railway, from the point where the descent begins, at the rate of two and a half feet in every fifty feet. At a point on Midland Avenue, nine hundred feet north of the crossing, the track of the railway west of the cut can be seen for over one-fourth of a mile; at a point on the avenue seventy-five feet north of the centre line of the railway, at the crossing, a person sitting in an open wagon can see up the cut, westward, one hundred and sixty feet; at fifty feet distant, he can look up the cut, a distance of two hundred and sixty feet, and at twenty-five feet distant he can see through the cut. On the day the accident occurred, Mr. Den Blaker had been at work on some land north of the railway, which he was farming. He lived south of the railway and had been accustomed to cross it frequently in going to and from his work. On the day in question, his work had been interrupted by a rain, and he had started to return home. He was in an open farm-wagon drawn by two horses. He was seen by an acquaintance when about four hundred yards north of the railway; he was then going towards it, on what the witness describes as a jog trot; he had a blanket over his shoulders and drawn up around his neck, which he held together in front, with one hand, while he held the reins with the other. As he passed the witness, he said he had some work to do and must hurry home. At this point the track of the railway, west of the cut, is in open view for about one-fourth of a mile. From this point, the evidence furnishes no information respecting Mr. Den Blaker's movements or conduct, until his horses were in the act of stepping upon the railway. Death was inflicted by an eastward bound train, consisting of two passenger

cars and a locomotive, running at a speed of twenty-five or thirty miles an hour. The fireman says, he first saw Mr. Den Blaker when the locomotive was twenty-five or thirty yards from the crossing; that his horses were just stepping on the track on a very slow walk; that Mr. Den Blaker had a blanket about his shoulders, his hat down over the side of his face to keep, as he supposes, the rain out of his ear; his hands were resting on his legs and the reins were slack. He further says, that Mr. Den Blaker did not raise his head, nor make any effort to stop or escape, and that he does not believe that he saw the locomotive at all. Both the fireman and engineer swear that the bell was rung constantly while they were passing through the cut, and up to the time of collision. A passenger on the train and also two persons who were about four hundred yards north of the crossing, at the time of the disaster, swear that they did not hear the bell. A moderate wind was blowing from the east, which unquestionably reduced both the velocity and volume of the sound of the approaching train perceptible at the crossing.

It is now an established principle of law, almost universally recognised, that a person intending to cross a railroad track, is bound to look and listen for an approaching train before going upon it, and if he fails to do so, and injury ensues, he is without remedy; or, if he looks and listens, and sees or hears a train approaching, and then daringly assumes the hazard of attempting to cross in advance of it, and fails, he must bear the consequences of his folly. In a case substantially identical in its facts with the one in hand, the Supreme Court of the United States recently said, speaking by Justice FIELD: "The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for his safety. Negligence of the company's employees in these particulars was no excuse for negligence on his part. He was bound to look and listen, before attempting to cross the railroad track, in order to avoid an approaching train, and not go carelessly into a place of danger. Had he used his senses, he could not have failed both to hear and see the train which was coming. If he omitted to use them, and went thoughtlessly upon the track, he was guilty of culpable negligence, and so far contributed to his injuries as to deprive him of any right to complain of others. If, using them, he saw the train coming, and yet undertook to cross the track

(instead of waiting for the train to pass), and was injured, the consequences of his mistake and temerity cannot be cast upon the company. No railroad company can be held liable for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure:" *Railroad Co. v. Houston*, 5 Otto 702. Precisely similar views have been repeatedly enunciated by the courts of this state. A simple reference to the cases is all that need be done. Even a brief summary of the principle decided in each would seem more like a labor of display than necessity or utility. *Central Railroad v. Moore*, 4 Zab. 831; *Runyon v. Central Railroad*, 1 Dutch. 558; *Telfer v. Northern Railroad*, 1 Vr. 199; *Harper v. Erie Railway*, 3 Id. 88; *N. J. Railroad and Trans. Co. v. West*, Id. 95; *N. J. Express Co. v. Nichols*, 4 Id. 439; *Drake v. Mount*, Id. 445; *Central Railroad v. Van Horn*, 9 Id. 138; *Del., Lack. & West. Railroad v. Toffey*, Id. 530.

If we test the claim of the petitioner by these rules, it is obvious it must be rejected. It is plain, the disaster could not have happened had the deceased, in approaching the crossing, exercised the caution which the law requires, and which any person of reasonable prudence would have exercised in approaching a place of such well-known danger. So far as appears, his organs of sight and hearing were perfect, and had he made that use of them which a reasonable regard for his safety demanded, it would have been impossible for him not to have both seen and heard the train in time to have averted a collision. If the statements of the fireman are believed—and there is no evidence contradicting them—it is manifest death was the result of foolhardy heedlessness. The fact that the disaster happened, tends very strongly, in my judgment, to confirm the substantial truth of his story. But, in my opinion, scarcely any rational view of the evidence, as a whole, can be adopted, which will not fully establish such a complete case of contributory negligence as bars all right to damages.

The relief asked must be denied, and the petition dismissed.

The doctrine laid down in the principal case, as applied to the circumstances, is generally accepted in this country with some qualification in the western states. Where the traveller has an unobstructed view of the track, and nothing has been done by the railroad com-

pany to confuse his mind or throw him off his guard, he is bound to look and listen for an approaching train; and for an injury received under such circumstances he is without remedy. See *Butterfield v. Railroad Co.*, 10 Allen 532; *Allyn v. Railroad Co.*, 105 Mass.

77; *Telfer v. Railroad Co.*, 1 Vr. 188; *Wild v. Railroad Co.*, 29 New York 315; *Gonzales v. Railroad Co.*, 38 Id. 442; *Gordon v. Railroad Co.*, 45 Id. 664.

But when the approaching train cannot be seen or heard by reason of obstructions (*Davis v. Railroad Co.*, 47 N. Y. 400), where the train is running at an unusual time (*Improvement Co. v. Stead*, 5 Otto 61; *Railroad Co. v. Trainor*, 33 Mo. 542), or at an extraordinary rate of speed (*Railroad Co. v. Moore*, 4 Zabriskie 824), where the company have removed a flagman, or disused some accustomed precaution without notice (*Ernst v. Railroad Co.*, 39 N. Y. 61), where the agent of the company directs the traveller to cross the track (*Warren v. Railroad Co.*, 8 Allen 227), and generally when the state of facts is complex: *Gaynor v. Railroad Co.*, 100 Mass. 208; *Wheelock v. Railroad Co.*, 105 Id. 203; in all these cases it has been held that the question of contributory negligence was for the jury, under the instruction that negligence is a want of that care which a person of ordinary prudence is presumed to use under the circumstances to avoid injury: *Railroad Co. v. Goddard*, 25 Ind. 197; *Bridge v. Railroad Co.*, 3 M. & W. 244.

There are, however, several decisions in which a measure of contributory negligence is apparently laid down more absolute than can be deduced from the common-law rule. In the Pennsylvania case of *Railroad Co. v. Beale*, 73 Penn. St. 504, it was impossible for the traveller to see or hear the train except from a space of ten feet "between the bluff and the watch-box." There was conflicting testimony whether from this space the train could be seen or not. At the trial of the case the judge left it to the jury to say whether under these circumstances the accident could have been avoided by stopping, looking and listening; for, if not, "the law does not demand vain and impossible things." This

was held by the Supreme Court to be error. "The duty of stopping," says SHARSWOOD, J., "is more manifest when an approaching train cannot be seen or heard than where it can. If the view of a train is unobstructed and no train is near or heard approaching, it might, perhaps, be asked, why stop? In such a case there is no danger of collision—none takes place—and the sooner the traveller is across the track the better. But the fact of collision shows the necessity there was of stopping; and therefore in every case of collision the rule must be an unbending one. If the traveller cannot see the track by looking out, whether from fog or other cause, he should get out, and, if necessary, lead his horse and wagon * * * There never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad track, is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the court." Two cases were cited by the court. The first was *Railroad v. Coyle*, 55 Penn. St. 396. There the plaintiff, a pedlar, drove on the track in a covered wagon, with his head muffled in an overcoat, and without precaution of any kind. It appeared in evidence that the track could be seen at intervals along his route, and up and down for sixteen feet from the crossing. The court charged that Coyle should have stopped, looked and listened; but added that whether he did or did not do so was for the jury under the evidence. This instruction was not disapproved of, and the Supreme Court, while intimating that a new trial should have been granted under the evidence, refused to reverse the judgment. In the second case cited, *Railroad v. Heilman*, 49 Penn. St. 60, the track was visible from some points on the road, and hidden at others by an intervening bank of earth; but the smoke-stack could be seen over the bank. The plaintiff was in a baker's

wagon, with closed sides and curtains drawn against the rain. The trial judge charged that it was the duty of a traveller to look and listen, and that the failure to do so was "evidence of neglect;" and left the question to the jury. This was held to be error, as the evidence was uncontradicted that the plaintiff never looked at all. "To determine," says STRONG, J., "whether there has been any negligence, involves two inquiries: first, what would have been ordinary care under the circumstances; and second, whether the conduct of the person charged with negligence came up to that standard. In most cases the standard is variable, and it must be found by a jury. But when the standard is fixed, where the measure of duty is defined by the law, entire omission to perform it is negligence. In such a case the jury have but one of these inquiries to make. They have only to find whether he upon whom the duty rests has performed it. If he has not, the law fixes the character of his failure, and pronounces it negligence." "Not looking for a coming train is not merely the imperfect performance of duty; it is an entire failure of performance. * * * We think, therefore, that the court should have instructed the jury that it was negligence itself, and not merely evidence of it, from which they might or might not find it. This would have left to them to find whether the plaintiff had looked for a train, and if he had not, whether his neglect to look had been a contributory cause of the injury he had received."

It will be perceived that the decision in *Railroad v. Beale*, *supra*, has defined the traveller's duty more rigidly than any previous case in Pennsylvania, or indeed than the law of any other state. A case can hardly be conceived under this decision when a traveller run over by a railway train at a crossing could recover. The dilemma stated by the court seems to embrace all circum-

stances. If the traveller failed to stop, look and listen, he is negligent; if he did stop, he must have seen the approaching train, and his attempt to cross was foolhardy. So too in *Wild v. Railroad*, 29 N. Y. 315, while the decision was based on the fact that the traveller had an abundant opportunity to see the track, it is added by DENIO, C. J., "A crossing can rarely, if ever, be so situated as to render it impossible or difficult for a traveller to observe the track on each side, for a sufficient distance to determine whether it is safe to proceed. If such localities exist, they should not be crossed at all; and it would be equally imprudent in the company to tolerate them and in the passenger to use that crossing. If the case is such as to require the person wishing to cross to come near the track to make his observation, that circumstance, so far from excusing him from the duty of looking at all, would only render that duty more imperative." This, however, can be considered only as a dictum, and so far as regards the right of the traveller to use such dangerous crossings, is overruled by *Davis v. Railroad*, 47 N. Y. 400, where, under circumstances similar to those of *Railroad v. Beale*, *supra*, it was held that the traveller is bound to use his eyes and ears while approaching the crossing; but that he is not required to stop, or if he is with a team, to get out and leave his vehicle and go to the track, or to stand up and go upon the track in that position in order to obtain a better view. There being conflicting evidence as to whether the plaintiff could, by looking and listening, having seen the train in time, it was held that this was for the jury, and that the entering of a nonsuit was error.

Somewhat similar to this was the case of *Railroad v. Toffey*, 9 Vroom 259, where the driver stopped and looked from a point forty feet from the track, but could see nothing on account of

intervening houses. The court charged that his duty was to look and listen "as far as practicable. If it be practicable to see up and down the track, he is bound to look; but if he could not see, the duty to look is of course not required of him," and left the question of negligence to the jury. This was held to be correct by the Supreme Court.

The general current of authority recognises the distinction laid down in *Artz v. Railroad Co.*, 34 Iowa 161, where the authorities were reviewed, and it was held, "1. That where a person, knowingly about to cross a railway track, may have an unobstructed view of the railroad, he cannot recover though the company be negligent. 2. But if the view of the railroad be obstructed, or there are complicating circumstances calculated to deceive or throw a person off his guard, the plaintiff's negligence is a question of fact for the jury." So in *Ernst v. Railroad*, *supra*, it is said that the traveller is "bound to use his eyes and ears, so far as there is opportunity." See to the same effect *Railroad Co. v. Fitzpatrick*, 35 Md. 32. The recent case of *Railroad Co. v. White*, 6 W. N. C. (Phila.) 516, shows that the practical limitations the "stop, look and listen" rule are recognised in Pennsylvania. It may be noted that the cases collected by Mr. Biddle in the article in 6 W. N. C. 504, show that where the defendant's negligence is established, and the evidence of the plaintiff's contributory negligence is given only by the defendant's witnesses, and is not admitted by the plaintiff, the case must go to the jury, upon the presumption of law in favor of the plaintiff that he exercised reasonable care.

The English cases substantially affirm the law laid down in *Artz v. Railroad Co.*, *supra*. See *Bridge v. Railroad Co.*, 3 M. & W. 244; *Butterfield v. Forester*, 11 East 60.

It may be noted that the phrase "stop, look and listen" is not generally employed. Most of the cases speak of the plaintiff's duty to use his senses, to use his eyes and ears, &c. This difference in statement is in reality important, for, so defined, it is equivalent to the duty of ordinary prudence; while the obligation to stop, look and listen, when erected into the "unbending rule" of *Railroad Co. v. Beale*, *supra*, appears to be liable to transcend that duty. The essential thing is that the jury, always prone to give damages against corporations in case of accident, should be held in check; and this is sufficiently attained, in all cases when the evidence is reasonably clear that the traveller, with full opportunity, failed to use his faculties before crossing the track, by the court directing a nonsuit or granting a new trial. But with this safeguard, the common-law test of contributory negligence appears to be sufficient. Has the plaintiff done what a man of ordinary prudence would do under the circumstances? This duty will vary with every case; and it would seem rational to recognise the "stop, look and listen" rule as dependent upon this broader doctrine, and to be invoked only when common sense would declare the traveller negligent. When the view of an approaching train is so cut off by natural or artificial obstacles that the traveller can see nothing until directly upon the track; and the engineer omits to whistle or ring the bell, so that the driver, within a few feet of the railway, sees the train bearing down upon him, it may well be that an attempt to cross is the best thing to be done under the circumstances. And, apart from this, why does not the traveller come under the protection of the rule that, in circumstances of sudden peril, caused by the act of the other side, a man is not to be held to do the absolutely best thing?

There is a class of cases in which it is laid down that where the negligence of the defendant is so great as to indi-

cate a willingness to inflict injury, then even want of care on the plaintiff's part will not prevent recovery : *Railroad Co. v. Adams*, 26 Ind. 76 ; *Daley v. Railroad Co.*, 26 Conn. 597. Thus it is said that a man who is injured while walking on the track can recover, if the engineer saw him, but refused to slacken speed : *Railroad Co. v. Trainor*, 33 Md. 542. This, in another form, is the doctrine of proximate negligence. See *Butterfield v. Forester*, *supra* ; *Trow v. Railroad Co.*, 24 Vt. 487. But a further advance has been made in some of the Western states, where it has been held that if

the negligence of the defendant is gross, and that of the plaintiff slight in comparison, the latter may recover ; although his want of care contributed to the accident. See the cases collected in *Railroad Co. v. Gretzan*, 46 Ill. 83. See also *Railroad Co. v. Hill*, 19 Ill. 499 ; *Railroad Co. v. Sweeney*, 52 Ill. 325 ; *Burham v. Railroad Co.*, 56 Mo. 338. The practical effect of this doctrine is to leave the mixed question of law and fact entirely to the jury, under the directions so general as to afford little guidance.

RICHARD S. HUNTER.

Supreme Court of Indiana.

TAMZAN TAYLOR v. LEVI S. STOCKWELL.

The regulation of remedies is within the power of the state legislatures, subject only to the restriction that as to past contracts they shall not be taken away entirely or so materially lessened as to impair the obligation of the contract itself.

States may exempt property from execution, or enlarge the amount so exempted, and such exemptions will, within the rule above given, be valid as applied to prior contracts.

By the law as existing when a debt was incurred, the realty of a husband was liable to sale upon execution, and the purchaser took the whole of it, subject to the contingency that if the wife of the debtor survived her husband, she might recover one-third of the land for her lifetime as dower. A statute was passed restricting sales upon execution to two-thirds of the land, and providing that upon such a sale the wife's title to the other third should vest at once as if her husband had then died. *Held*, that the statute was valid as against a creditor claiming under a prior contract.

ACTION to recover land. The following were the material facts in the cause: In February 1874, Alfred E. Taylor, the husband of the appellant, owned the land in dispute, which was worth less than \$20,000. At that date, he, with others, executed a promissory note to the Howe Machine Company for \$380. Afterwards, in September 1875, the payee of the note recovered a judgment thereon against the makers in the Bartholomew Circuit Court; an execution was duly issued upon the judgment, by virtue of which the land in controversy was levied upon and sold by the sheriff, as the property of said Alfred E. Taylor, and the appellee, Stockwell, held the sheriff's deed for the property made in pursuance of the sale.

The appellant claimed, under the Act of March 11th 1875, 1 Rev. Stat. 1876, p. 554, one-third of the land, and demanded that it be set off for her. The court below, however, decided against her, and thereupon she appealed to this court.

The first and second sections of the act referred to, are as follows :

Sect. 1. That in all cases of judicial sales of real property, in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute and vest in the wife in the same manner and to the same extent as such inchoate interests of married women now become absolute upon the death of the husband, whenever, by virtue of said sale, the legal title of the husband in and to such real property shall become absolute and vested in the purchaser thereof, his heirs or assigns, subject to the provisions of this act and not otherwise. That when such inchoate right shall become vested, under the provisions of this act, such wife shall have the right to the immediate possession thereof, and may have partition, upon agreement with the purchaser, his heirs or assigns, or upon demand, without the payment of rent, have the same set off to her.

Sect. 2. The provisions of this act shall not apply to sales of real estate upon judgments rendered prior to the taking effect of this act, nor to any sale of real property of the value of \$20,000 and over, nor to the sale of such real property of the aggregate value of \$20,000 and over, except to so much of such real property as shall not exceed in value the sum of \$20,000.

The opinion of the court was delivered by

WORDEN, J.—It will be seen that the note upon which the judgment was rendered, was executed before the taking effect of the statute, though the judgment was rendered afterwards.

The statute doubtless, in terms, applies to such case, and entitles the appellant to one-third of the land, and to immediate partition thereof, if it be valid, as applied to judgments rendered upon contracts entered into by the husband before the taking effect thereof.

The appellee claims, and the court below decided, that the statute, as applied to sales on judgments rendered upon the contracts with the husband, entered into before the taking effect of the act, is void, as being in conflict with the provision in the federal and state constitution, forbidding the passage of any law impairing the obli-

gation of contracts: Const. U. S., art. 1, sect. 10; Const. Ind., Bill of Rights, sect. 24. The appellant contends, on the other hand, that the statute is constitutional and valid, as applied to such case. We have been furnished with able and exhaustive briefs upon the point by the counsel of the respective parties, which have greatly facilitated our labors in the examination of the question.

In order to a clear understanding of the question, it may be well to consider to what extent the creditor could have subjected the husband's land to the payment of the debt by the law existing at the time the contract was executed. This will aid us to comprehend more clearly the extent and character of the change made by the Act of 1875, and to determine the validity of the change as applied to contracts previously executed.

By the law, as it stood at the date of the contract, the creditor was entitled to have sold on execution the entire fee in the husband's lands for the payment of the debt. The purchaser, unless the land was redeemed as provided for, took the fee in the entire land, subject to the contingency that the wife should survive the husband, in which event he became divested of the title to one-third thereof in favor of the surviving wife. In the event that the husband survived the wife, the purchaser retained the fee to the entire land, and in either event he held the entire land during the joint lives of the husband and wife.

By the Act of 1875, the interest which the creditor could have sold on execution, and which the purchaser could acquire under the sale, was cut down to two-thirds of the land. The other third, to which the wife had only an inchoate right during coverture, to become consummate only on the contingency that she should survive her husband, is given immediately to the wife. By the law of the date of the contract the whole of the land could be sold, subject only to the wife's interest in one-third thereof contingent upon her survivorship.

By the law of 1875 only two-thirds of the land can be sold. In other words, the latter act exempts from sale on execution the third of the land to which the wife has an inchoate right during the marriage, to become consummate on the death of the husband, leaving her surviving, and vests her immediately with the consummate right thereto upon such sale of the other two-thirds.

It is sometimes difficult to determine satisfactorily whether an enactment merely affects the remedy without impairing the obliga-

tion of the contract, or whether by affecting the remedy it impairs that obligation.

The latest exposition of the subject to which our attention has been called is that contained in the case of *Edwards v. Kearzey*, 96 U. S. 595. In that case a debt was contracted in North Carolina at a time when only personal property to the value of \$50, and real estate to the value of \$500, were exempt from execution. Afterwards, by the constitution of that state of 1868, personal property to the amount of \$500, and a homestead, not exceeding in value \$1000, were exempted from execution. It was held that the increased exemption was invalid in respect to the prior contract, on the ground that it impaired the obligation thereof. The opinion of the court was pronounced by Mr. Justice SWAYNE, who, having considered the case at length, announced as the conclusion of the court the following proposition: "The remedy subsisting in a state when and where the contract is made, and is to be performed, is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the constitution, and is therefore void."

It may be noted that Mr. Justice HARLAN dissented, but the grounds of his dissent are not stated. Mr. Justice CLIFFORD delivered the following opinion, which we regard as valuable, and which we cannot condense without impairing its force. He said, "I concur in the judgment in this case upon the ground that the state law, passed subsequent to the time when the debt was contracted, so changed the nature and extent of the remedy for enforcing the payment of the same as it existed at the time, as materially to impair the rights and interests which the complaining party acquired by virtue of the contract merged in the judgment. Where an appropriate remedy exists for the enforcement of the contract at the time it was made, the state legislature cannot deprive the party of such remedy, nor can the legislature append to the right, such restrictions or conditions as to render its exercise ineffectual or unavailing. State legislatures may change existing remedies, and substitute others in their place, and if the new remedy is not unreasonable, will enable the party to enforce his rights without new and burdensome restrictions; the party is bound to pursue the new remedy, the rule being, that a state legislature may regulate at pleasure the modes of proceeding in relation to

past contracts as well as those made subsequent to the new regulation.

“Examples where the principle is universally accepted may be given to confirm the proposition. Statutes for abolition of imprisonment for debt are of that character, as so are statutes requiring instruments to be recorded, and statutes of limitation.

“All admit that imprisonments for debt may be abolished in respect to past contracts as well as future; and it is equally well settled that the time within which a claim or entry shall be barred may be shortened, without just complaint from any quarter. Statutes of the kind have often been passed; and it has never been held that such an alteration in such a statute impaired the obligation of a prior contract, unless the period allowed in the new law was so short and unreasonable as to amount to a substantial denial of the remedy to enforce the right: *Angell Lim.* (6th ed.) sect. 22; *Jackson v. Lamphire*, 3 Pet. 280.

“Beyond all doubt a state legislature may regulate all such proceedings in its courts at pleasure, subject only to the condition that the new regulation shall not in any material respect impair the just rights of any party to a pre-existing contract. Authorities to that effect are numerous and decisive, and it is equally clear that a state legislature may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or certain articles of universal necessity in household furniture, shall, like wearing apparel, not be liable to attachment and execution for simple contract debts.

“Regulations of the description mentioned have always been considered in every civilized community as properly belonging to the remedy to be exercised or not by every sovereignty, according to its own views of policy and humanity. Creditors, as well as debtors know that the power to adopt such regulations resides in every state to enable it to secure its citizens from unjust, merciless and oppressive litigation, and protect those without other means in their pursuits of labor, which are necessary to the well being and the very existence of every community. Examples of the kind were well known and universally approved, both before and since the constitution was adopted, and they are now to be found in the statutes of every state and territory within the boundaries of the United States; and it would be monstrous to hold that every time some small addition was made to such exemptions that the statute making it

impairs the obligation of every existing contract within the jurisdiction of the state passing the law.

“Mere remedy, it is agreed, may be altered at the will of the state legislature, if the alteration is not of a character to impair the obligation of the contract; and it is properly conceded that the alteration, though it be of the remedy, if it materially impairs the right of the party to enforce the contract, is equally within the constitutional inhibition. Difficulty would doubtless attend the effort to draw a line that would be applicable in all cases between legitimate alteration of the remedy, and provisions which, in the form of remedy, impair the right; nor is it necessary to make the attempt in this case, as the courts of all nations agree, and every civilized community will concede that laws exempting necessary wearing apparel, the implements of agriculture owned by the tiller of the soil, the tools of the mechanic, and certain articles or utensils of a household character, universally recognised as articles or utensils of necessity, are as much within the competency of a state legislature as laws regulating the limitation of actions, or laws abolishing imprisonment for debt: *Bronson v. Kinzie*, 1 How. 311.”

Mr. Justice HUNT also delivered an opinion in the cause, in which he said: “I concur, not for the reason that any and every exemption made after entering into a contract is invalid, but that the amount here exempted is so large as seriously to impair the creditor’s remedy for the collection of his debt. I think the law was correctly announced by Mr. Chief Justice TANEY, in *Bronson v. Kinzie*, 1 How. 311, when he said: A state ‘may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like apparel, be not liable to execution on judgments.’

“The principle was laid down with the like accuracy by Judge DENIO, in *Morse v. Goold*, 11 N. Y. 281, where he says: ‘There is no universal principle of law that every part of the property of the debtor is liable to be seized for the payment of a judgment against him. * * * The question is whether the law, which prevailed when the contract was made, has been so far changed that there does not remain a substantial and reasonable mode of enforcing it in the ordinary and regular course of justice.’”

It is thus seen that a state legislature may exempt property from execution, such as implements of agriculture, tools of the

mechanic, household furniture, &c., without impairing the obligation of contracts previously entered into, within the meaning of the constitution, or increase the amount of exemption after the making of a contract without working such results.

This goes upon the principle that the legislature may, in the pursuit of an enlightened public policy, and on principles of humanity, reserve to the debtor, as exempt from execution, the reasonable means of carrying on his business and occupation and a reasonable amount of the necessities of life; and that this will not impair the obligation of previous contracts. The creditor knows when he lends his credit that the legislature may make such reasonable exemptions.

Such exemptions are held not to materially impair the obligation of contracts. In the language of Mr. Justice SWAYNE, in the case above cited: "It is to be understood that the encroachment thus denounced must be material. If it be not material, it will be regarded as of no account."

The difficulty in such cases is to determine when the exemption is so great as to materially interfere with the remedy of the creditor, and when not. In the North Carolina case it was held that the exemption was so large as to thus interfere.

In the case of *Stephenson v. Osborne*, 41 Miss. 119, an act was passed exempting certain property from execution (the kind or value of which is not stated in the report of the case), and providing that upon the death of the husband it should descend to the widow. The law was held to be valid in respect to past contracts. The court said, among other things: "Laws exempting certain descriptions of property from liability to be taken in execution for debt, are founded in a wise and beneficent public policy. The state has an interest, that no portion of its citizens shall be reduced to a condition of destitution, so as to be prevented from prosecuting useful industrial employments, for which they are fitted; and that families shall not be deprived, by extravagance or misfortune, of the shelter and comforts necessary to health and activity. Nor is such legislation usually regarded, even when retrospective in its character, as obnoxious to constitutional objections. * * * The legislature exercises this power according to its own views of humanity and sound policy. But it is not without its proper limit, and it may be abused. Every party is entitled to an adequate and available remedy for the enforcement of his contracts, and any legislation

which impairs the value and benefit of the contract, though professing to act upon the remedy, would impair its obligation.

"It is not competent for the legislature, under color of an exemption law, so to obstruct the remedy upon contracts as to render it nugatory or impracticable. An abuse of the legislative discretion in this respect, would demand the interposition of the court. We do not undertake to intimate what would amount to such abuse; such a question would be one of great delicacy and difficulty."

Afterwards, in the case of *Lenly v. Phipps*, in the same state, 49 Miss. 790, where at the time of a contract, land not exceeding one hundred and sixty acres, of a value not exceeding \$1500, was exempt from execution, and afterwards the legislature extended the exemption to two hundred and forty acres of land, regardless of its value, which might be worth \$10,000 or \$20,000, it was decided that the latter act was void as to the prior contract.

Having thus ascertained, as nearly as may be, the state of the laws on the constitutional question, we proceed to apply it to the case before us.

Previous to the Code of 1852, a widow was endowed of the lands of her deceased husband. By that code dower was abolished; and it was provided that one-third of the husband's lands, upon his decease, should descend to his widow, with a certain qualification as to amount where there were creditors.

It was also provided that upon the death of the husband, with the qualification above noticed, the surviving wife should be entitled to one-third of all the lands of which the husband was seised in fee-simple at any time during the marriage, in the conveyance of which she may not have joined in due form of law. See Statute of Descents, 1 R. S. 1876, p. 408, sect. 16, 17, 27.

It may be observed that in *Noel v. Ewing*, 9 Ind. 37, these enactments were held valid as applied to a marriage existing at the time the statute took effect; so far as the husband and wife, and the heirs or devisees of the husband were concerned we are not aware that any question has ever been made in this court as to the validity of the enactment giving the surviving wife one-third of the land so far as existing creditors of the husband were concerned.

The wife, then, as the law stood, before the act of 1875, had an inchoate right to one-third of the land of which the husband was seised in fee-simple, at any time during the marriage, and this right became consummate upon the death of the husband, unless she

had in the meantime joined in the conveyance thereof in due form of law. This third, in connection with the other two-thirds, might have been sold on execution against the husband, subject to the contingency of the wife's survivorship. But by the act of 1875, this third cannot be sold at all in that manner; and when the other two-thirds are thus sold, the hitherto inchoate right of the wife becomes at once consummate.

We are of opinion, in view of the principles and authorities hereinbefore noticed, that the legislature did not transcend its authority in thus cutting off, to the limited extent mentioned in the statute, as to the value of the property, the right to sell the third in which the wife had such inchoate interest. The act is not in our opinion open to the objection that it impairs the obligation of contracts. The provision is but a reasonable one for the protection of the wife and family against absolute want and destitution; and the land thus saved may be as imperatively needed as the farming implements of the farmer, or the tools of the mechanic. The same public policy and the same principles of humanity that would protect the one would also protect the other from sale. Then the remedy of the creditor is not in point of fact materially impaired. Where lands are sold, subject to the contingent interest of the wife, they seldom bring more than the value of the two-thirds, because this is all the purchaser is sure of getting. Before the purchaser receives his deed, which cannot be within a year after the sale, the husband may die, and the right of the wife becomes consummate. The purchaser seldom enhances his bid in consequence of the chance of obtaining the title to the third in which the wife has an inchoate interest, hence the remedy of the creditor is not materially impaired by withholding that third from sale altogether. And hence also, much injustice is frequently done, where the purchaser bids what he safely may as the value of two-thirds, but eventually obtains title, by his purchase, to the whole, the wife not surviving.

It follows from what has been said, that the court below erred in holding that the statute was void as to judgments rendered upon prior contracts.

The judgment below is reversed with costs, and the cause remanded for further proceedings in accordance with this opinion.

Supreme Court of Kansas.

THE STATE v. MARTIN RUTH.

To constitute rape it is not essential that the female shall make the utmost physical resistance of which she is capable. If, in consequence of threats and display of force, she submits through fear of death or great personal injury, the crime is complete.

A certificate of an officer charged with the custody of public records that his records show a certain fact, is not, in the absence of express statute, competent evidence of the fact. There should be a certified copy of the records that the court may see whether the records prove the fact.

A defect in the verification of an information is waived by pleading to the merits and going to trial.

By statute Ness county was attached to Pawnee county for judicial purposes until it should be organized. The law in reference to the organization of new counties provided, that after certain proceedings had been taken, the governor should appoint commissioners and clerks, and that the county should be organized from and after the qualification of these officers. On the trial of a party in the Pawnee County District Court, charged with the commission of an offence in Ness county, it was objected that the District Court of Pawnee county had no jurisdiction because of the place of the offence. No evidence was offered as to the organization of Ness county, and the District Court overruled the objection: *Held*, no error.

THE defendant was convicted in the District Court of Pawnee county, of rape, and thereupon brought his appeal.

H. B. Johnson, Willard Davis and N. B. Freeland, for the state.

Nelson Adams, for defendant.

The opinion of the court was delivered by

BREWER, J.—Several questions are presented in the record. It is alleged that the information was insufficient for lack of a proper verification; the verification was defective, but the defect was waived by the defendant's pleading to the merits and going to trial: *State v. Otey*, 7 Kans. 69.

The jurisdiction of the court was challenged. The prosecution was in the District Court of Pawnee county, and the offence charged to have been committed in Ness county. By sect. 2, chap. 67, Laws 1874, the county of Ness was until organized attached to Pawnee county for judicial purposes. On the trial, a certificate of the secretary of state was offered for the purposes of showing that Ness county had been duly organized, but the District Court rejected

the testimony. We see no error in this ruling, for the certificate was simply a statement that the records of his office showed certain facts, as "that Ness county was duly organized by proclamation of the governor on the 23d day of October 1873," and did not purport to furnish copies of any paper or record. The paper was a certificate of a fact and not a certified copy of any paper of record. And that such a certificate is not in the absence of express direction of statute, competent evidence is clear: *Bemis v. Becker*, 1 Kans. 226; *Owen v. Boyle*, 3 Shepl. 147; *English v. Sprague*, 33 Me. 440; 1 Greenl. on Ev., sect. 498, and cases cited in note.

Will the court, in the absence of evidence, take judicial notice of the date of the organization of new counties? Doubtless the court takes judicial notice of the fact that in the eastern portion of the state there are counties duly organized, and with all the machinery of the law and courts in full operation, and that the western portion is composed of unorganized territory, but whether it will take notice of the time when any particular county passes from an unorganized to an organized condition is doubtful. Such passage dates not from any proclamation from the governor or from any action of the executive, but "from and after the qualification of the officers appointed" by the governor: Laws 1872, p. 244, sect. 1; Laws 1875, p. 244, sect. 1.

And it can hardly be that the court is to take judicial notice of the times at which certain officers appointed in a county hitherto unorganized take the oath of office and give their official bond. It would seem that this is a question of fact and a subject-matter of proof. Doubtless, when a District Court is held in a county, it will be presumed by this court that the county is so organized as to afford officers and other machinery for the holding of court, and that the action of the district judge in thus holding court is warranted by the facts as he has found them to exist, and this presumption can only be overthrown by evidence proving the contrary. It is not necessary in each case to prove that the county has in fact been organized. Is not the converse of this proposition equally correct? The question now before us is not whether this court, in an original action, is to take judicial notice of the fact that a county is regularly organized and courts held therein, but whether, when the District Court is not held in such county, and the court of an adjoining county, to which, by express statute, the county is attached for judicial purposes, declines to recognise such county as

organized, and continues to exercise the jurisdiction it unquestionably once held, this court shall, in proceedings in error, take judicial notice of the fact that the officers had duly qualified, the county become regularly organized, and that the District Court erred in not so recognising the fact and holding terms of court therein. See the case of *Wood v. Bartling*, 16 Kans. 109, on this question.

But is it true that the legislature has no power to attach one organized county to another for judicial purposes? The constitution provides, sect. 5, art. 3, that, "The state shall be divided into five judicial districts," and in section 18, same article, names the counties of which such districts were at first to consist. It also provided by said sect. 5 that the "District Courts should be held at such times and places as may be provided by law." It does not say that they shall be held in each county, and though, by sect. 7, a clerk of the District Court is to be elected in each organized county, is there any inhibition on the legislatures providing that the District Court in each district be held at only one place in the district. Again the number of districts may be increased by law, but it requires the concurrence of two-thirds of the members of each House: sect. 14; and "*new or unorganized* counties shall, by law, be attached for judicial purposes to the most convenient judicial districts: sect. 19. Now, under that, may not the legislature attach a new though organized county for judicial purposes to any convenient district or to any county in that district? Such certainly was the understanding of the legislature in the early history of the state. For the first state legislature attached Clay, Dickinson, Saline and Ottawa counties to the county of Davis; the counties of Washington, Republic and Shirley to the county of Marshall, and so on. See Laws 1861, page 123, sect. 1. Some of these counties so attached were named in the constitution as named in the five districts, and others were organized intermediate the sitting the constitutional convention and the admission of the state. That such contingencies as the creation and organization of new counties was foreseen and provided for, the constitution itself discloses, and the power to provide for the administration of justice in them, without creating new districts, was expressly granted. And the Bill of Rights, as foreseeing the very question here presented, guarantees to an accused "a speedy public trial by an impartial jury of the county or district in which the offence is alleged to have been committed:" Bill of Rights, sect. 10. But it is, perhaps, un-

necessary to pursue this inquiry further. It does not seem to us that this court can hold that the District Court erred in exercising jurisdiction of the case.

The law of the case was fairly presented by the charge of the court. The court declared that the force necessary to constitute the crime of rape might be mental or physical force, or both combined, and that if a person by threats or by placing a female in fear of death, violence or bodily harm, induces her to submit to his desires, and while under this influence, ravishes her, this is as much a forcible ravishing as if a person by reason of his superior strength would hold a woman and forcibly ravish her. We understand the court to simply mean that the act must be committed, either (1) by physical force against the will of the female, or (2) with her acquiescence procured by threats or violence. On the contrary, the court was asked to declare that the offence charged could not be committed unless there was the utmost reluctance and the utmost resistance on the part of the female. The distinction between the two theories is broad and well defined. Under the former, acquiescence induced by mental terror and fear of violence, supersedes the necessity of physical resistance. Under the latter there must be actual physical resistance; the female, when assailed, must persist, though she knows resistance will be vain; she must fight, though she may believe this course will bring upon her other and greater violence; she must cry aloud, though she knows no relief is near; she must arouse her sleeping infant sisters to be witnesses to the outrage, though she knows they can render her no aid. Under the former, the force may be either actual or constructive, while under the latter, it must be actual. The weight of reason and authority is with the view of the court below: *Turner v. People*, 33 Mich. 363; *Commonwealth v. McDonald*, 110 Mass. 405; *Wright v. State*, 4 Humph. (Tenn.) 194; *People v. Duhring*, 59 N. Y. 374; *Regina v. Camplin*, 1 Cox C. C. 220; Roscoe's Cr. Ev., 6th Am. ed., 806; 1 East P. C. 97, 444.

In Roscoe's Cr. Ev., *supra*, it is said, "It must appear that the offence was committed without the consent of the woman; but it is no excuse that she yielded at last to the violence, if her consent was forced from her by fear of death or by duress." In 2 Bishop's Criminal Law, sect. 1120, the author says, "Yet wherever there is a carnal connection, without anything which can be deemed a consent, where there is neither a consent fraudulently procured, nor

any other sort of consent by the woman, there is evidently in the wrongful act itself, all the force which the law demands as an element of the crime." And again, in sect. 1125, "A consent induced by fear of personal violence is no consent, and though a man lays no hand on a woman, yet if by an array of physical force he so overpowers her mind that she dares not resist, he is guilty of rape, by having the unlawful intercourse." See also 2 Whart. Am. Cr. Law, sect. 1142; *Pleasants v. The State*, 8 Eng. (Ark.) 360; see also *State v. Shields*, 45 Conn. 258, where it was held, that a refusal of the court to charge that to constitute the crime of rape, it was necessary that the female should have manifested the utmost reluctance, and should have made the utmost resistance, was not error. The importance of resistance is simply to show two elements in the crime; forcible carnal knowledge by the one party, and non-consent by the other. The jury must be satisfied of the existence of these two elements by the resistance of the complainant, if she had the use of her faculties and physical powers at the time, and was not prevented by terror or the exhibition of brutal force. So far her resistance is important, but to make the crime hinge on the uttermost exertion the woman was physically capable of making, would be a reproach to the law and to common sense. The question is one of fact, and a jury must determine it.

As to the questions of fact we cannot say that the jury erred, or that the verdict was against the evidence. The case substantially hinged on the relative credibility of the prosecuting witness and the defendant. He admitted the intercourse, but claimed that it was voluntary on her part; she testified that there was a forcible ravishing. The corroborating testimony which, however, was limited, tended to support the prosecuting witness. The jury believed her story, and the trial judge approved their verdict. We cannot say that it was wrong, and the judgment must be affirmed.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹SUPREME COURT OF ILLINOIS.²

COURT OF ERRORS AND APPEALS OF MARYLAND.

SUPREME COURT OF MICHIGAN.⁴SUPREME COURT OF MISSOURI.⁵SUPREME COURT OF NEW JERSEY.⁶ACCOUNT. See *Equity*.

ACTION.

Breach of Promise—Incapacity to Contract.—A promise to marry made by a person physically and incurably impotent is contrary to the statutory policy of the state, and its breach will not constitute a cause of action: *Gulick v. Gulick*, 12 Vroom.

ADMINISTRATOR.

Bill by, to remove Cloud.—An administrator, taking neither an estate, title nor interest in the lands of his intestate, cannot maintain a bill to remove a cloud from such lands. He takes a mere power to sell to pay debts of the intestate, and if he sells for that purpose, he must take the land as he finds it: *Ryan v. Duncan*, 88 Ills.

AGENT

When Principal Bound.—Where a son is suffered to act as a general agent for his father, both in buying and selling articles in the father's line of business, the public will be justified in assuming that the son possessed all the powers of a general agent, in buying and selling, and the father will be liable for goods ordered by the son in his father's name, suited to his business, though the son uses them himself: *Thurber v. Anderson*, 88 Ills.

BILL OF EXCEPTIONS.

Presentment After the Term.—A bill of exceptions, filed after the term, will not be considered, unless it appears by an entry of record that the opposing party consented to the filing. An entry showing merely that he was present when the court gave the appellant leave to file it out of time, is not sufficient; nor will the defect be cured by an entry subsequently made by the clerk, in vacation, reciting that consent was given: *State v. Duckworth*, 68 Mo.

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1878. The cases will probably be reported in 8 or 9 Otto.

² From Hon. N. L. Freeman, Reporter; to appear in 88 Ills. Reports.

³ From J. Shaaf Stockett, Esq., Reporter; to appear in 48 Maryland Reports.

⁴ From H. A. Chanoy, Esq., Reporter; to appear in 40 Michigan Reports.

⁵ From T. K. Skinker, Esq., Reporter; to appear in 68 Missouri Reports.

⁶ From G. D. W. Vroom, Esq., Reporter; to appear in vol. 12 of his reports.

BILLS AND NOTES. See *Evidence*.

Endorsement of Waiver of Protest.—The endorsement by the payee of a promissory note, that he holds himself "responsible for the within note, without notice or protest," is of no other effect than to waive protest and notice as a necessary step to fix his liability in case the drawer fails to pay the note at maturity: *Halley v. Jackson*, 48 Md.

The liability of the maker and endorser of such note is several, and it is error to proceed against them as if they were jointly bound: *Id*.

CONSTITUTIONAL LAW. See *Limitations, Statute of*; *Municipal Corporation*

COURTS.

Jurisdiction.—Illegality in the service of process by which jurisdiction is to be obtained, is not waived by the special appearance of defendant to move that the service be set aside; nor after such motion is denied, by his answering to the merits. Objection to the illegal service is considered as abandoned, only when the party pleads to the merits in the first instance, without insisting upon the illegality: *Harkness v. Hyde*, S. C. U. S., Oct. Term 1878.

CRIMINAL LAW.

Accomplice—Testifying in behalf of the State.—Where an accomplice is convicted after having been made a witness by the state, and received as such by the court, and after having made an ingenuous confession, such accomplice has an equitable claim to a judicial recommendation to the mercy of the pardoning power, which cannot be withheld without a violation of an established rule of practice: *State v. Graham*, 12 Vroom.

It is competent for the court to order the accomplice to be acquitted at the trial, for the purpose of qualifying him as a witness for the state, or to accept from the defendant a plea admitting guilt to such a degree as, in the opinion of the court, is requisite; or for the court to assent to the entering of a *nolle prosequi* by the attorney-general: *Id*.

Forgery of Municipal Obligations—Elements of the Crime.—It is not essential to the crime of forgery, that the person in whose name the instrument purports to be made, shall have legal capacity to make it. It is sufficient, under Wag. Stat., sect. 16, p. 470, if it is made with intent to defraud, and on its face would be likely to defraud. Thus, the making a false municipal certificate of indebtedness, with intent to injure or defraud, is forgery, notwithstanding the municipality may have no power to issue such certificates: *State v. Eades*, 68 Mo.

Indictable Nuisance.—A house in which unlawful sales of liquor are habitually made, is an indictable nuisance, although there is a city ordinance prescribing the penalties for such sales, as such traffic is not only a breach of the city law, but also of the statutory policy of the state: *Meyer v. State*, 12 Vroom.

Obtaining Goods under False Pretences.—An indictment for obtaining a stock of goods in exchange for a tract of land under false pretences, charged that defendant *designedly*, feloniously and falsely pretended that

he was the owner of the land, and averred that in truth and in fact he was not the owner; but did not charge that he knew he was not the owner. *Held*, that this was a fatal defect; the *scienter* should have been expressly averred; the use of the word "designedly" did not dispense with it: *State v. Bradley*, 68 Mo.

The indictment also charged that defendant pretended that he had an abstract which showed a perfect title in himself; but there was no averment that he did not have such an abstract. *Held*, that the absence of this averment was fatal, and the defect was not supplied by an averment that defendant well knew the abstract to be imperfect, and untrue in showing that he had title. If such was the fact, the abstract should have been set out as a false token or writing, and the defendant should have been charged with designedly, feloniously and falsely pretending that it was a true abstract, and correctly represented the title to be in him; and this charge should have been accompanied by a proper negative and an averment of the *scienter*: *Id.*

DAMAGES. See *Frauds, Statute of*; *Officer.*

DEED.

Reformation of—Equity.—Where the terms of a deed are agreed upon and the parties go to a conveyancer and state such terms to enable him to draft the deed, and the grantor, afterwards, without the knowledge of the grantee, gives other directions as to the terms to be inserted, which are followed, and the grantee accepts the deed, supposing it to be drawn as agreed upon, a court of equity will reform the deed, the proceeding being a fraud upon the grantee: *Berger v. Ebey*, 88 Ills.

EASEMENT. See *Lateral Support.*

EQUITY. See *Receiver.*

Account—Laches.—In matters of account, more especially, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy—from the difficulty of doing entire justice between the parties (which as a court of conscience it is bound to do), where the transactions have become obscure by time, and the evidence may be lost: *Hall, Adm'r, v. Claggett*, 48 Md.

Lapse of time may operate as a bar to a decree to account. In equity *laches* and neglect are discountenanced. Stale demands without an effort to enforce them, cannot invoke the aid of a tribunal which only lends its power to reasonable diligence.

EVIDENCE. See *Trial.*

Bills and Notes—Judicial Notice of Time.—An averment that a note, dated August 12th 1872, at four months, was presented for payment, December 14th 1872, is sufficient to show a presentment at the proper time, because the court will take judicial notice, not only of the law-merchant, but also of the almanac, from which it appears that the 15th of December 1872 fell on a Sunday: *Reed v. Wilson*, 12 Vroom.

It must be presumed that the three days of grace allowed by the general law-merchant are also allowed by the law of Pennsylvania, where the note was payable: *Id.*

Usage—Judicial Notice of Laws of Former Government.—The common usage of any country in reference to its measures should be followed in estimating such measures when referred to in grants made there: *United States v. Askeu*, S. C. U. S., Oct. Term 1878.

The courts of the United States take judicial notice of the laws which formerly prevailed in countries acquired by the United States, up to the time of such acquisition. As to such countries, they are not deemed foreign laws, but the laws of an antecedent government: *Id.*

The true Mexican vara is slightly less than 33 American inches, but by use in California, it is estimated at 33 inches, and in Texas at 33½ inches: *Id.*

FORCIBLE ENTRY AND DETAINER.

Parties Defendant—Agent.—A writ of restitution in an action of forcible entry and detainer, will not necessarily be unavailing because the persons who were living upon the land at the institution of the suit were not made defendants. If they were the servants of the person who was made defendant, they can be dispossessed under the writ; and the fact that defendant does not live in the county where the land lies, does not alter the case; *DeGraw v. Prior*, 68 Mo.

FRAUDS, STATUTE OF.

Promise to Pay for Services rendered to Another.—Where after three visits made by a physician to a son-in-law of the defendant, the latter undertook to be responsible for the payment for the services of the former, and services were subsequently rendered under this promise, the defendant's promise is an original undertaking as to the subsequent visits, and he is liable for the reasonable value of such services, but not for services rendered before his undertaking: *King v. Edmiston*, 88 Ills.

Verbal Promise to Pay the Debt of Another—Damages.—A verbal promise to pay the debt of another is within the Statute of Frauds, and void if made to the creditor; but not if made to the debtor: *Pratt v. Bates*, 40 Mich.

A man promised certain stockholders to pay the debts of the corporation, in consideration of which they transferred some of their stock to him. They were not liable themselves, and were interested only as stockholders. Failing to pay a certain debt he was sued in assumpsit by the creditor upon an assignment of this agreement. *Held*, that the action did not lie, since nothing was assigned but the damages resulting to the stockholders from the non-payment of that one debt, and their interest could not be ascertained in a court of common law, nor severed from the entire transaction: *Id.*

The measure of damages for failure to pay the joint obligations of others, is the whole amount of the debts: *Id.*

HOMESTEAD.

Abandonment.—Where a mortgagor abandons his homestead, it is immaterial whether he knew or was ignorant of the fact that the mortgage contained a clause releasing it, at the time he executed the same, or whether his wife signed or acknowledged the same; the mortgage will thereby be rendered operative as to the homestead: *Cobb v. Smith*, 88 Ills.

INJUNCTION.

When Order for, is same as the Writ.—Where the defendant in a bill is present when an order for a writ of injunction is granted, and has full notice thereof, he is bound to observe it, the same as if the writ were issued, or be in contempt; and on dismissal of the bill, thereby removing the restraining order, damages may be properly assessed: *Danville Banking and Trust Co. v. Parks*, 88 Ills.

INSURANCE.

Liability of Agent for Premiums taken after Company has been excluded from the State.—An agent of an insurance company, who issues a policy and takes the premium after the company's certificate of authority to do business in this state has been revoked by the superintendent of the insurance department, is liable to return the premium, notwithstanding he was not, at the time, aware of the revocation, and the four weeks' notice of revocation required by Wag. Stat., sect. 32, p. 772, has not been given by the superintendent: *McCutcheon v. Rivers*, 68 Mo.

Meaning of "Legal Heirs" in Policy.—A policy of life insurance, payable to the "legal heirs" of the person whose life is insured, when he leaves children at his death, is payable to them. His widow in such case is not included in the words as an heir: *Gauch v. St. Louis Mutual Life Ins. Co.*, 88 Ill.

INTERNATIONAL LAW.

The division of an empire does not of itself destroy rights of property held by the citizens of its different parts, though situated in a different division from that in which they may reside: *Airhart v. DeMessieu et al.*, S. C. U. S., Oct. Term 1878.

A citizen of Mexico was not divested of his title to lands in Texas by the revolution, nor by the constitution or laws subsequently adopted; but retained the right to alienate the same, and to transmit the same to his heirs, being also citizens of Mexico, and such heirs are entitled to sue for and recover such lands in the courts of Texas: *Id.*

JUDGMENT.

Time when Lien Attaches.—A judgment has relation to the time when it is entered up. It will not affect any *bona fide* conveyance, made for value before that time, for it only attaches upon that which is then, or afterwards becomes the property of the debtor; and if the property be charged in equity before the entry of the judgment, the judgment will not affect such charge: *Dyson v. Simmons*, 48 Md.

JURY. See *Trial*.

LACHES. See *Equity*.

LATERAL SUPPORT.

Right of—Restriction.—Every landowner has a right to have his land preserved unbroken, and an adjoining owner excavating on his own land is subject to this restriction, that he must not remove the earth so near to the land of his neighbor that his neighbor's soil will crumble away under its own weight and fall upon his land. But this right of lateral

support extends only to the soil in its natural condition. It does not protect whatever is placed upon the soil increasing the downward and lateral pressure. If it did it would put it in the power of a lotowner, by erecting heavy buildings on his lot, to greatly abridge the right of his neighbor to use his lot. It would make the rights of the prior occupant greatly superior to those of the latter: *Northern Transportation Co. v. Chicago*, S. C. U. S., Oct. Term 1878.

LIMITATIONS, STATUTE OF.

Defence under is a Vested Right.—When a right of action has become barred under a Statute of Limitation, the statutory defence is a vested right, that cannot be impaired by subsequent legislation: *Ryder v. Wilson's Executors*, 12 Vroom.

In the administration of a decedent's estate, the expiration of the time for the creditors to present their claims, worked, under the old law, a bar to claims not presented. *Held*, that the repeal of the law authorizing this procedure, did not revive the right to enforce, against the personal representative, such unrepresented claims: *Id.*

The rule and the fact that the claim sued on was not presented within the time limited, may be pleaded as a bar: *Id.*

MALICIOUS PROSECUTION.

Termination of Prosecution.—In an action for malicious prosecution, the plaintiff must show that the prosecution or proceeding of which he complains, is legally at an end, and that it was instituted maliciously and without probable cause: *Potter v. Casterline*, 12 Vroom.

The legal termination of the prosecution is sufficiently shown by the refusal of the grand jury to find a bill, without a formal order of discharge by the court: *Id.*

A rejection of the complaint by the grand jury is *prima facie* evidence of want of probable cause: *Id.*

There is no error in refusing to non-suit, if, from the facts proved, the jury might infer that the defendant had no actual belief or suspicion of the plaintiff's guilt: *Id.*

A defendant in such an action cannot excuse himself by showing that he acted under the advice of an unprofessional person: *Id.*

MARRIAGE. See Action.

MORTGAGE. See Homestead.

Equitable Mortgage—Enforcement in Equity of a Defective Mortgage.—If a party makes a mortgage or affects to make one, but it proves to be defective, by reason of some informality or omission, such as failure to record in due time, defective acknowledgment or the like, though even by the omission of the mortgagee himself, as the instrument is at least evidence of an agreement to convey, the conscience of the mortgagor is bound and it will be enforced by a court of equity, not only as against the mortgagor, but as against judgment-creditors of the mortgagor obtaining their judgments subsequent to the date of the mortgage, except where this principle has been modified by statute: *Dyson v. Simmons*, 48 Md.

Removal of Building.—A mortgagor, while he has the right to use

the mortgaged premises, has none to commit waste, or to remove buildings therefrom, or to do any other act impairing the security; and the removal of a house from the premises may be enjoined in equity, or if it has been severed without the consent of the mortgagee, he may maintain replevin at any time before it becomes attached to and forms a part of other realty: *Dorr v. Dudderar*, 88 Ills.

MUNICIPAL CORPORATIONS.

Police Power—Nuisance.—The legislature may for police purposes, prescribe the limits of municipal bodies, enlarging or contracting them at pleasure, and give them power to pass ordinances, to prevent nuisances, to operate beyond their boundaries: *Chicago Packing and Provision Co. v. Chicago*, 88 Ills.

Assessment of Benefits for Improvements—Constitutional Law.—The legislature has the constitutional power to authorize benefits to be assessed and levied by the Mayor and City Council of Baltimore, upon property adjacent to, as well as within the limits of, the city: *Brooks v. Mayor of Baltimore*, 48 Md.

Such assessment is not a tax for the support of the municipal government, but a contribution from persons, whose property has been increased in value by the opening and widening of the street in question, at least in an amount equal to the sum they were required to pay: *Id.*

Taxes and special assessments for benefits stand upon widely different grounds, and the distinction between them has been so generally recognised, that it must now be considered as settled: *Id.*

NUISANCE. See *Criminal Law*.

Acts done under Authority of Law.—That cannot be a nuisance such as to give a common-law right of action, which the law authorizes: *Northern Transportation Co. v. Chicago*, S. C. U. S., Oct. Term 1878.

A legislature may and often does authorize and even direct acts to be done, which are harmful to individuals, and which without authority would be nuisances, but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful and are not nuisances, unless the power has been exceeded: *Id.*

In such grants of power, a right to compensation for consequential injuries caused by the authorized erections, may be given to those who suffer, but then the right is a creature of the statute. It has no existence without it: *Id.*

Where a tunnel was authorized to be constructed by an act of the legislature of the state, and directed by an ordinance of the city councils: *Held*, that the city was not liable for consequential damages to adjoining owners: *Id.*

Persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction and with care and skill: *Id.*

OFFICER.

Becoming a Trespasser, by Exceeding his Authority.—An officer has no authority for threshing wheat he has levied upon in the mow, before selling it: *Stilson v. Gibbs*, 40 Mich.

An officer who is sued on the ground that he exceeded his authority, is not to be presumed to have been justified by extraordinary circumstances, but has the burden of showing the necessity of his action: *Id.*

Where an officer, by abuse of his authority, renders himself technically liable as trespasser *ab initio*, and is sued therefor, the jury may nevertheless in their discretion limit the award of damages to the plaintiff's actual injury: *Id.*

If an officer with an execution misuses the property levied upon, he is liable to the execution-debtor therefor, and possibly to the creditor also, if the sale on the execution fails to satisfy the judgment: *Id.*

PARTNERSHIP.

Dissolution—Distribution of Assets—Equity.—As long as the debts of a partnership are outstanding, it is irregular to undertake to distribute any assets thereof amongst the partners. The right of any partner or his representative extends only to his share of any surplus, after all of the liabilities of the firm have been discharged. It is the duty of each partner to aid in the final settlement of the business of the firm. If the firm have been finally dissolved, this duty of the partners would still continue; it had to be wound up, their assets if any, applied to the discharge of their liabilities—steps taken to recover any effects belonging to the partnership; receipts, acquittances or discharges given and a final ascertainment of the condition of the firm: *Hall, Adm'r v. Clagett*, 48 Md.

The powers of the partners were co-ordinate, whether the partnership was in active operation, or subsisted only for the purpose of winding up the affairs thereof, and it was the duty of each partner to keep precise accounts of all his own transactions for the firm, and to have them at all times ready for inspection: *Id.*

If there have been a total failure to do this, it affords a good reason for a court of equity to decline to supply them, without a sufficient reason or excuse for the omission: *Id.*

A court of equity will not grope its way in utter darkness and undertake to create and establish a claim upon mere contingencies, or the preponderance of mere possibilities or probabilities. There is no duty devolving on it to assume the impracticable task of adjusting the relative rights of partners, when the proof is utterly deficient and inconclusive: *Id.*

Dissolution by Death—Surviving Partners.—A firm is dissolved by the death of a partner: *Jeness v. Carleton*, 40 Mich.

A surviving partner cannot bind co-survivors by signing the firm name, without their express authority or ratification; *Id.*

PATENT. See United States Courts.

PLEADING.

Declaring upon Express Contract between Other Parties.—A plaintiff declaring specially upon an express contract between third persons alone, must aver his title and then make out by evidence the same contract as that set forth in his declaration, and his right and title as alleged: *Rose v. Jackson*, 40 Mich.

The right to sue upon a contract as assignee, must be positively

averred, and an allegation of the assignment in the consolidated common counts will not support a recovery upon a special count in which it is not averred. Nor would a mere additional allusion to the assignment in the special count be sufficient: *Id.*

POSSESSION.

When adverse.—If one takes possession of the land of another, believing and claiming it to be his own, his possession is adverse. It is only where he occupies by mistake and with no intention of claiming any thing which does not belong to him, that it is not adverse: *Walbrunn v. Ballen*, 68 Mo.

A proposal from one in the possession of land to buy out the holder of the true title, does not necessarily amount to a recognition of this title, or an acknowledgment that the possession is not adverse: *Id.*

RECEIVER.

Power to Sue in another State.—A receiver appointed in a foreign jurisdiction, clothed with authority to take the designated property, wherever situate, may sustain a suit for such property in the courts of this state: *Hurd v. Elizabeth*, 12 Vroom.

This is the rule whenever the creditors of the person represented by the receiver do not intervene: *Id.*

SALE.

Agreement that Title not to pass—Sale by Vendee.—If a party buys corn under an agreement, that if it does not prove to be of grade No. 2, in the place to which it is to be shipped, the title is not to pass, but it shall be subject to the disposal of the vendor, and such purchaser through his agent, sells the same after it is inspected and rejected as No. 2, he will be liable for the price received by him to the vendor: *Burns v. Mays*, 88 Ills.

SPECIFIC PERFORMANCE.

Control of Equity over Contracts—Demand for Performance.—Stipulations not actually made and to which the parties might not have assented, cannot be imported into a contract, however equitable they may be: *Nims v. Vaughn*, 40 Mich.

Where a demand for specific performance has once been made and refused, it is not necessary to repeat it under similar circumstances before suing to compel it: *Id.*

A decree in chancery is no bar to a suit that does not involve the same questions, even though they might have been brought into the first case by a cross-bill, but were not: *Id.*

Specific performance will not be refused as inequitable because of the fluctuation of values, where the court has no means of knowing what bearing the contract had on the negotiations of the parties: *Id.*

STATUTE.

Exemption from Taxation.—A statute exempting property from levy and sale, is not to be construed strictly, but so as to carry out the obvious intention of the legislature: *Washburn v. Goodheart*, 88 Ills.

Where property is exempt from execution, the debtor may sell, mort-

gage or pledge it as he pleases, without making it liable to levy and sale under execution: *Id.*

TAXATION. See *Municipal Corporation*; *Statute*.

TRIAL.

Scintilla of Evidence—Questions for the Jury.—Where there is only a *scintilla* of evidence on any essential fact the case should be taken from the jury: *Conely v. McDonald*, 40 Mich.

Where the evidence has a legal tendency to make out a proper case in all its parts, its weight and sufficiency, however slight, is a question for the jury alone: *Id.*

Where a jury's finding of an essential fact is wholly unsupported by evidence, it is erroneous as matter of law, but where it is supported by any evidence, however slight, it is a finding of fact and cannot be reviewed on writ of error: *Id.*

TRUST AND TRUSTEE.

Purchaser on foreclosure made Trustee for the benefit of a prior Grantee whose rights should have been protected.—Contracting parties must not act in bad faith to third persons who are in such relations to either as to be affected by their agreement or its consequences: *Huxley v. Rice*, 40 Mich.

A transaction that is in fraud of one's rights may be construed in equity so as to be a means of saving and protecting them: *Id.*

Where a conveyance is obtained for fraudulent ends or under oppressive circumstances, the party deriving title is converted into a trustee, if necessary, for administering relief: *Id.*

One who has sold mortgaged land with warranty and has covenanted to pay off the mortgage, cannot make title in himself as against his grantee by allowing foreclosure and redeeming the land: *Id.*

K. sold to H. a parcel out of a lot which he had mortgaged and then allowed the mortgage to be foreclosed upon the whole lot, and by a collusive arrangement with R. in his own interest but in fraud of H.'s rights, the lot was bid in by R., who then refused to release to H. except upon terms. *Held*, that R. should be considered as holding H.'s parcel as trustee for H.'s benefit, and so far as H. was concerned, as K.'s mortgagee: *Id.*

Revocation.—Where a party makes another trustee of notes endorsed and delivered by her to him, not only for her own benefit, but also for the benefit of the makers of the notes, the trustee being one, she cannot revoke the same, nor will a court of equity revoke the same, where no abuse of the trust is shown: *Light v. Scott*, 88 Ills.

UNITED STATES COURTS.

Suits between Citizens of the same State about Patents.—A suit between citizens of the same state cannot be sustained in a Circuit Court of the United States as arising under the patent laws, where there is no denial of the validity of the plaintiff's patent, where its use is admitted, and where a subsisting contract is shown governing the rights of the parties in the use of the invention: *Hartell et al. v. Tilghman*, S. C. U. S., Oct. Term 1878.

Relief in such an action is founded on the contract, and not on the patent laws of the United States: *Id.*

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CITIZENSHIP BY NATURALIZATION.

I.

NATURALIZATION being an act by which a change of political *status* is effected, under regulation of municipal or national authority, is a proceeding within the exclusive cognisance of the municipal or national tribunal, to whose administration it is committed by the supreme authority; and as the validity of the act depends upon construction of municipal or national law, all questions, whether of fact or of law, growing out of the act, are referable to the municipal or national court or tribunal. It is never a question of international concern, and is not determinable by reference to external, international or public law.

It may be, however, and not infrequently is, the subject of treaty stipulation between powers who are not satisfied with the existent state or condition of the law or practice, either in respect of the terms or the mode by which a change of nationality is effected.

The national character, which results from origin, continues till legally changed; and the *onus* of proving such change, usually rests upon the party alleging it. Naturalization, it has been said,¹ is the rule of modern states.

Whether wisely or not, each nation, in the absence of treaty stipulation, reserves to itself the right to dictate the terms and to prescribe the formalities upon which the certificates or letters of

¹ Argument on Naturalization, by the advocate of the United States, before the American-Spanish Commission (under agreement, February 12th 1871). Washington, D. C.

naturalization will be issued, as well as the individuals to whom they may be issued; and it exercises this right without reference to the country of origin of the individual applicant, or any other country. And no nation which assumes the responsibility of naturalizing aliens makes any concession as to this, except under the solemnity and sanctity of treaty stipulation, and by the employment of express and explicit language in regard thereto.

"It has already been remarked," says an author whose utterances are everywhere received with respect and confidence (Hall's International Law and Laws of War 693), "that every independent state has, as one of the incidents of its sovereignty, the right of municipal legislation and jurisdiction over all persons within its territory, whether its own subjects or foreigners, commorant in the land. With respect to its own subjects this right, it is claimed, includes not only the power to prohibit their egress from its territory, but to recall them from other countries; and with respect to commorant foreigners, not only to regulate their local obligations, but to confer upon them such privileges and immunities as it may deem proper. It may, therefore, change their nationality by what is called naturalization. It is believed that every state in christendom accords to foreigners, with more or less restrictions, the right of naturalization, and that each has some positive law or mode of its own for naturalizing the native born subjects of other states, without reference to the consent of the latter for the release or the transfer of the allegiance of such subjects. It seems, therefore, that so far as the practice of nations is concerned, the right of naturalization is universally claimed and exercised without any regard to the municipal laws of the states whose subjects are so naturalized." Felix, *Droit International Privé*, §§ 27-55; 1 Philimore on *Int. Law*, §§ 315, *et seq.*; Cushing, *Opinions U. S. Attorney-General*, vol. 8, p. 125, *et seq.*; Don, *Derecho Publico*, tome 1, cap. 17; Riquelme, *Derecho Internacional*, tome 1, p. 319; Heffter, *Droit International*, § 59; Westlake, *Private Int. Law*, § 20, *et seq.*; Bello, *Derecho Internacional*, pt. 2, cap. 5, § 1.

"Naturalization, in most of its aspects, belongs to the department of Municipal Law, or Private International Law." * * *

"Public international law can seldom be concerned in the question of political citizenship acquired by naturalization, unless, &c." * *

"Every nation claims the right to give the complete character of citizen to an alien, without consulting the wish of the state of his

birth. Most nations admit, that if a native voluntarily emigrates and makes a permanent domicile in another country, and receives from that country the full rights of citizenship, the country of his birth cannot enforce claims upon him *originating after his naturalization.*" Wheat. Intern. Law, Dana's 8th ed., p. 142 *et seq.*; note by the editor.

While laying down the same doctrine, in language at once positive and conclusive, an eminent publicist (Calvo, Derecho Internacional, vol. i., pp. 295, *et seq.*), says: "But if it is beyond doubt that every independent nation has a right to confer the title of citizen upon a foreigner, it is also true that she can control the loyalty of her own subjects, and she can impose conditions upon or altogether prohibit expatriation. With this view the laws of all nations have fixed certain essential requisites for the complete denationalization of their subjects or citizens, some going to the extent of requiring the assent or consent of the supreme executive power. How then can these two rights (or claims) be reconciled? If public law recognises in each state the power (faculty) to naturalize the subjects or citizens of another, how can it also admit the power (faculty) in the same state to make conditions or to prohibit expatriation altogether? At first sight it appears that these two rules are irreconcilable; nevertheless the contradiction is only apparent. International law recognises the power (or faculty) in a state to naturalize the subjects or citizens of another, but naturalization does not take place by virtue of said international law, but as a consequence of local legislation. So that the new citizen or subject is the pure and exclusive creation of the civil and political laws of the country of adoption, and he will enjoy solely the rights, privileges and immunities which they confer. And what has been said of naturalization applies to expatriation, or the breaking of the natural bonds of citizenship, which have their origin and are preserved for ever in the shadow of local legislation. The right of expatriation, then, like that of naturalization, is subordinated under the point of view of international law to the general principle that each independent state is sovereign in its own territory, and that its laws are binding upon all persons who are within its jurisdiction, but that they have no force beyond her territory. It clearly follows then, from the doctrine laid down, that while the subject or citizen remains within the limits and under the jurisdiction of his new country, or in any other state, he will preserve the national character conferred by naturalization. But if

he has not acquired the new citizenship, by severing, according to local law, the bonds of the country of his birth, it is evident that the return of the naturalized to his native country will place him again under her jurisdiction, subjecting him to the obligations, duties and penalties which the laws impose, or have imposed, unless there are stipulations to the contrary in special (or particular) treaties. These principles have been recognised in the jurisprudence of the United States."

It is believed that cases in which conflicts have heretofore arisen, as well as others which may arise in future, will be relieved of serious embarrassment and much perplexity, when viewed in the light of the distinction drawn and the reasoning invoked by this author. And if attention is directed to the fact that the conflict between the laws of naturalization and the laws of expatriation is only apparent, much advance will have been made, both in the avoidance of unnecessary controversies and in the settlement of delicate questions of dignity and prerogative between independent states.

"Natural allegiance, or the obligation of perpetual obedience to the government of the country wherein a man may happen to have been born, which he cannot forfeit or cancel, or vary by any change of time, or place, or circumstance, is the creature of civil law, and finds no countenance in the law of nations, as it is in direct conflict with the incontestable rule of that law: *Extra territorium jus dicenti impune non paretur.*" Twiss, Law of Nations (Peace) 231. See also Riquelme, Derecho Internacional, tom. i., p. 319; Puffendorf, de Officio Hominis et Civis, lib. ii., cap. 18.

Since the French Revolution, continental nations generally have given up the Roman civil-law doctrine of perpetual allegiance, and have conceded the right of expatriation. Foreign Relations of the United States, pt. 2, pp. 1363, 1364. Washington: Government Printing Office, 1873.

"It is," says Treitt, "in fact, a principle inherent in human liberty, a principle of natural right, that a person may leave the soil on which his birth may by chance have thrown him. This principle is admitted by all publicists, from Cicero down to our own times." Ibid. 1280, 1282.

"The doctrine of absolute and perpetual allegiance—the root of the denial of any right of emigration," said Cushing (Opinions of Att.-Gen. U. S., vol. 8, p. 139), "is inadmissible in the United

States. It was a matter involved in, and settled for us by the Revolution, which founded the American Union."

"The natural right of every free person," said Judge BLACK (Opinions Att.-Gen. U. S., vol. 9, p. 356), "who owes no debt and is not guilty of any crime, to leave the country of his birth, in good faith and for an honest purpose—the privilege of throwing off his natural allegiance and substituting another allegiance in its place—is incontestable."

"Expatriation," said the same authority, "includes not only emigration out of one's native country, but naturalization in the country adopted as a future residence. When we prove the right of a man to expatriate himself, we establish the lawful authority of the country in which he settles to naturalize him if its government pleases. What, then, is naturalization? There is no dispute about the meaning of it. The derivation of the word alone makes it plain. All lexicographers and all jurists define it one way. In its popular, etymological and legal sense it signifies the act of adopting a foreigner, and clothing him with all the privileges of a native citizen or subject."

One of the obvious conclusions which follow from the train of reasoning pursued by the Spanish publicist, Calvo, *ante*, is that there may be, under view of international law, a distinction, important and material in its effects, between the *personal* rights and the *property* rights of a naturalized citizen, as follows: If, as has been shown, the adopted voluntarily returns to his native country, *animo manendi*, or inherits, purchases or leaves real property in its territorial limits, he subjects himself and property to the obligations, duties and penalties which the laws of the country of his birth impose, or have imposed, and he can expect no relief as against these from the country of adoption; and, as to any right or title to property in the country of birth, during absence from the territory, the adopted is entitled to the same exemption, and to the like protection, at the hands of both the country of origin and the country of adoption, as a native or alien friend would receive under the same circumstances. And a majority of the cases which have been the subject of diplomatic negotiation, or have been before the mixed commissions on claims, and have involved a discussion of citizenship, will be relieved of much embarrassment if the above distinction between property rights and personal rights be kept in view.

In the absence of treaty stipulations, the personal rights of the naturalized, in the territory of the country of origin, as elsewhere, are inviolable; and in respect of these the country of adoption owes him the protection that it extends to natives; and this obligation to protect continues, *until the naturalized has given unquestionable evidence of renunciation of the acquired, and resumption of natural allegiance*; a return to and commorance in his native country for purposes of business or pleasure alone, is not such evidence. In respect to property rights in realty within said territory, they remain subject to the municipal law of the country where situated; and the measure of protection which may be claimed as to these is the same as that accorded to its own citizens, or alien friends, according to circumstances.

It is important, however, to observe that if the country of origin, from whatever motive, fails to give the naturalized the protection of its municipal laws, in all matters of property, the obligation rests upon the country of adoption to secure to its new citizen or subject, from the mother country, full reparation and indemnity. And this indemnity is, in practice, usually secured by intervention of diplomatic negotiation, or through the instrumentality of mixed commissions established for this purpose and clothed with the jurisdiction necessary to do justice and equity as between the parties.

In cases of the return of naturalized citizens to the country of origin, the same rule as to the burden of proof, which applies to a renunciation of natural allegiance and the acquisition of a new citizenship by individuals, may be invoked; and the *onus* of proving renunciation of the acquired nationality, and the resumption of the natural or original allegiance, usually rests upon the party alleging it.

From time to time cases have arisen where the country of origin has denied the claims of the country of adoption in respect to the exercise of protection over the adopted citizen. One of the historic and familiar cases was that of Koszta, a Hungarian, and one of the refugees of 1848-9. This was an extreme but interesting case. Koszta came to the United States, declared his intention to become a naturalized citizen, then went to Smyrna, where he was seized by some persons in the pay of the Austrian consulate; he was by them taken out into the harbor and thrown overboard; he was picked up by an Austrian man of war, and held as prisoner; the United States consul remonstrated with the commander, and on the latter's refusal to surrender Koszta, the

captain of a United States ship of war demanded his release, and threatened, if necessary, to resort to force. The matter was finally compromised, and Koszta was released and shipped to the United States, the Austrians formally reserving the empty right of proceeding against him if he should return to Turkey. Of this case it has been said with positiveness by a late writer, that the United States carried the doctrine of acquired nationality beyond reasonable bounds; and the reasoning of Mr. Marcy, in support of the claim of his government, has been criticised as "remarkable for its boldness;" and it is pointed out that in his reasoning "the effect of domicile in respect of civil consequences is confounded with its effect as to political consequences, which is altogether inadmissible."¹

In the subsequent case of Simon Tousig, an Austrian, who voluntarily returned to Austria after domiciliation in the United States, Mr. Marcy did not assert this doctrine. In the first case the American secretary of state was doubtless led into the confusion indicated by his English critic as a result of following the guidance and applying the principles laid down in this regard by the late annotator of Story's *Conflict of Laws*. At a later date Lord WESTBURY insisted that the same distinction had been by the learned editor confounded by failing to draw a distinction between the *social* and *political* status—between the *patria* and the *domicilium*. It is now admitted by the American authorities that the declaration of the intention to become an American citizen has in itself no effect on the nationality of the individual; he remains an alien till final admission to citizenship.² But when once the alien has been admitted to citizenship, the American doctrine in its relation to him has always been consistent and firm, and the United States extends to the naturalized citizen as well against interference by the country of origin, as by any other foreign power, protection as broad and co-extensive as that which it extends to the native citizen under similar circumstances. Of the case of Koszta, Lord Chief Justice COCKBURN says, "both parties were in the wrong; the Austrians had no pretence of right for seizing Koszta on Turkish territory. On the other hand, the American authorities had no right to claim Koszta as an American subject [?](citizen), as he had not actually become naturalized. The party really entitled to

¹ *Nationality*, Lord Chief Justice COCKBURN: London, Ridgway, 1869, p. 122.

² See *Treaties between United States and Austria, Baden, Bavaria, Hesse, Mexico, North Germany, Sweden and Norway, Wurtemberg and Ecuador*.

complain was the Ottoman government, which refused the application of the Austrians for leave to arrest Koszta, and protested against the outrage offered to their authority, but whose protest does not appear to have been heeded."

To the remonstrance of the Austrian government, as to a violation by the officers of the United States of the neutrality of Turkish territory, Mr. Marcy replied: "If the Ottoman Porte had been able to protect, against Austrian intrusion, the integrity of its territory, by preventing the capture of a person covered by the North American flag, the United States would not have had occasion to interpose their authority for the protection of this person." Reviewing this case, and referring particularly to the position assumed by the Austrian cabinet and by Baron de Cussy, who adopted the view of Austria, and to the response of the American secretary, Calvo (*Le Droit International*, Paris, 1870, p. 453), seems to justify the position taken by Mr. Marcy, and to regard his answer to Austria, as well as his explanation to the Sultan, as satisfactory.

Alluding to the case of Carl Schurz (actual Secretary of the Interior), Calvo (*Id. ib.*) says: "Another example, not less interesting, of the power which naturalization by states confers upon their new subjects or citizens, is that of M. Carl Schurz, native of Prussia, condemned to death in 1848, together with Professor Kinkel, by a German tribunal, for having taken part in the revolutionary movements. M. Schurz managed to escape the pursuit of justice, and took refuge in the United States, where he was naturalized, became a member of Congress from the state of Ohio, later general of militia, and finally was appointed minister to Madrid. Before proceeding to occupy this post, M. Schurz returned to Germany, by the help of a disguise, and attempted to bring about the escape of his accomplice, Professor Kinkel; it was then that the cabinet at Washington concluded to appoint him her representative at Berlin, to negotiate with Prussia a treaty on questions relating to the right of naturalization. The Prussian government consented to forget the antecedents of M. Schurz, to recognise his new nationality, and to admit him without difficulty in the character of diplomatic representative of the United States. The selection of a former Prussian subject as minister of the United States at Berlin, had an origin which it is important to recall."

In the case of Zeiter, a native of France, but a naturalized citizen of the United States, which came before the civil tribunal of the first instance in the arrondissement of Wissembourg, Lower Rhine, France, in 1860, the attempt was made to hold Zeiter to the performance of military duty in the French army, on the ground that as a native of France, he was liable to such duty. But when the certificate of naturalization, forwarded by the United States consul at Paris, was registered at Wissembourg, and then produced in court, the judges decided "that Michael Zeiter, by naturalization in a foreign country, had lost his character of Frenchman," and released him. *Foreign Relations of the United States, Part II., 1873.* Washington: Government Printing Office.

In 1860 a case occurred at Havana of Sabino de Liano, a native of Spain, naturalized in the United States, being arrested as a conscript. In reply to the representations of the United States consul, the captain-general informed him that by a royal decree of the 17th November 1852, "the foreigner obtaining naturalization in Spain, as well as the Spaniard obtaining it within the territory of another power without the knowledge and authorization of his respective government, shall not exempt himself from the obligations which were consequent to his primitive nationality, although the subject of Spain may, in other respects, lose the quality of Spaniard, conformably to what is prescribed in art. 1 of the constitution of the monarchy." But to this pretension the United States would not yield, and the answer to this communication from the representative of Spain was, in substance, a repetition of the doctrine that the United States makes no difference between naturalized and native citizens, and that she does not admit any qualification in respect to them in the matter of protection. A shield of one figure and the same texture covers naturalized and native. Eventually the proceedings taken against Mr. Liano were suspended, and a bond which he had entered into to provide a substitute cancelled by the governor-general.¹

It is not many years since John Mitchel, a native of Great Britain, the Irish patriot, or agitator, as he has been differently characterized, according as the description was by sympathiser or antagonist, became naturalized in the United States. The history of this case shows that Mitchel, having been convicted in the courts of

¹ Papers relating to foreign relations of the United States on Naturalization and Expatriation, vol. 2, p. 1303: Government Printing Office, Washington, 1873.

Great Britain of a political offence, was condemned to penal servitude in Australasia, and that before his time was completed he made his escape and reached the United States, where he was naturalized. After many years residence in the United States subsequent to naturalization, Mitchel offered himself, or was announced as a candidate from an Irish borough to fill a vacancy in the British House of Commons. This occurred at a time of some political agitation, particularly in Ireland and Canada; and however fictitious the character or however exaggerated the proportions of this agitation may have been, many circumstances combined to give this ardent Irishman a following, and he was elected. The contingency which would arise, should Mitchel present himself or his credentials to the House of Commons, made it of moment to the government of Great Britain to multiply the grounds of his ineligibility. And although at that date the nation still held to the doctrine of perpetual allegiance, and an eminent publicist of Doctors' Commons had declared upon authority cited (1 Phillimore, Commentaries on International Law 380¹), that, under International Law, banishment itself did not destroy citizenship, it was deemed important to show the American citizenship of this claimant to a seat in one of the Houses of the Parliament of Great Britain. Search was instituted in the courts of the United States, and the record of Mitchel's naturalization having been discovered, a certified copy of the same was forwarded to London by the Minister of Great Britain, Sir Edward Thornton. Mitchel died, however, before the time arrived for the presentation of himself or his credentials to the House of Commons. Had he survived and his right to a seat been insisted upon, some strange and perplexing, though not necessary, questions might have been brought forward for consideration; but it is probable that a near and ready solution would have been reached; for it would have been competent, under the law and custom of Parliament, for the House of Commons to have adjudged Mitchel disabled and incapable to sit as a member, by reason of his previous conviction. (Blackstone, Commentaries, vol. 1, p. 162, and note by Christian.)

“Naturalization is usually called a change of nationality. The naturalized person is supposed, for the purposes of protection and allegiance at least, to be incorporated with the naturalizing country. This proposition is, generally speaking, sound; but it must admit

¹ The references to Phillimore are to the London edition, 1871.

of one qualification similar to that already mentioned with respect to the domiciled subject, if the naturalized person should have been the original subject of a country which did not allow him to shake off his allegiance (*exuere patriam*)," (1 Phillimore, Internat. Law, p. 380). The qualification to which reference is here made is contained in the expression *jus avocandi*, which is defined to be a right which every state has of recalling its citizens from foreign countries, especially for the purpose of performing military services to their own country:" (Id. p. 377). "Great difficulty, however," says the same author "necessarily arises in the enforcement of this right. No foreign nation is bound to publish, much less enforce, such a decree of revocation." And it is further said that the *jus avocandi*, already spoken of, could not be legally denied to the country of origin by the adopting or naturalizing country, though the enforcement of the right could not be claimed. And it is insisted, on the authority of Sir LIONEL JENKINS, that banishment itself does not destroy the original tie of allegiance: (Id. p. 380). The conflicts which have occurred on this subject of allegiance between the country of origin and the naturalizing country, in cases where the former has declined to admit the exercise of the right of expatriation in subject or citizen, have seldom been pressed to the point of war. An historic exception, however, may be found in the war of 1812, between Great Britain and the United States, which was precipitated by the resistance of the United States government to the claim of Great Britain to a right of visitation and search of American vessels on the high seas. "No foreign state," (says Phillimore, p. 377), "can legally be invaded for the purpose of forcibly taking away subjects commorant there. The high seas, however, are not subject to the jurisdiction of any state; and a question therefore arises whether the state, seeking its recalled subjects, can search for them in the vessels of other nations met with on the high seas. This question, answered in the affirmative by Great Britain, and in the negative by the United States of North America, has led to very serious quarrels between the two nations—quarrels which it may be safely predicted will not arise again. For I cannot think that it would be now contended that the claim of Great Britain was founded upon international law. In my opinion it was not."¹

¹ The editor of Dana's Wheaton, 8th ed., p. 175, note, pointed out that "the subject of the impressment of seamen had been confused by the questions which

The question as to the effect and value of a certificate of naturalization, came up for consideration before the umpire of the American and Spanish Commission,¹ in the case of Delgado, where the arbitrators had disagreed in relation to Delgado's nationality.² The umpire decided: "That the claimant (Delgado) has been naturalized an American citizen according to the laws of the United States; that the judge who ordered him to be admitted a citizen of the United States was, as it has been decided in many cases by the Supreme Court of the United States, the competent authority to decide, if the claimant had sufficiently complied with the law which prescribed a continued residence of five years in the United States before having a right to obtain the naturalization."

In this case the advocate of Spain had contended that it appeared from proofs submitted by the defence, that the claimant, Delgado, was absent from the territory of the United States, and in the territory of Spain once or twice between the beginning of his five years of residence in the United States and the issuance of his certificate of naturalization; and, therefore, it must be held that he had not complied with the requirement of the law of the United States in respect to residence. In a subsequent case (*Fernando Dominguez v. Spain*), the same question was presented to the umpire³ who had succeeded M. Bartholdi. In sustaining the posi-

have been discussed in connection with it." * * * "In the discussions that arose out of the case of *The Trent*, neither of the parties to the correspondence, and no writer on the subject, pretended that Mason and Slidell could be removed as citizens, rebels or criminals. A right to take them out, as distinct from the arrest of *The Trent*, as a prize proceeding, was not claimed by the United States government, and their release was placed on that ground." Id.

It is a part of the secret history of *The Trent* affair, current in Washington, that when Benjamin F. Butler presented to William H. Seward, Secretary of State, the opinion of Caleb Cushing, endorsed by the former, to the effect that the United States would be justified in holding Mason and Slidell, the secretary said: "I have no doubt you, gentlemen, are right in your law; but we are going to give up *Mason and Slidell*."

See Lawrence's "Visitation and Search," p. 13 *et seq.* Also, Lawrence's *Wheaton*, pp. 217, 378, 797, 807, 939.

¹ Bartholdi, Envoy Extraordinary and Minister Plenipotentiary from France to the United States.

² The agreement of February 11th 1871, between Spain and the United States, contained a clause to this effect: " * * * Nevertheless, in any case heard by the arbitrators, the Spanish government may traverse the allegation of American citizenship, and thereupon competent and sufficient proof thereof will be required."

³ Baron Blanc, Envoy Extraordinary and Minister Plenipotentiary from Italy.

tion of the United States, and adhering to the decision of his predecessor, Baron Blanc expressed himself as follows: "Finally, neither the authorities on public law nor the agreements between Spain and the United States furnish any unquestioned and controlling definition of what constitutes in fact a legal residence with presumable *animus manendi*, and when absence intervenes with presumable *animus revertendi*, such as would justify or empower the umpire to overrule by force of treaties or of the laws of nations the construction placed by a court of competent jurisdiction upon a municipal law as to the required residence in the United States for the next continued term of five years preceding the admission to American citizenship. Therefore the construction thus given, however broad it may be deemed, must be followed so long as it is unimpeached or unreversed by an American tribunal of superior jurisdiction. The tribunals of the United States are the sole interpreters of the laws of the country, and it is not the privilege of the umpire to review their declarations as to the requirements of these laws."

When this decision of the umpire was filed, the arbitrator on the part of Spain,¹ entered a formal protest to the above extract from the decision, in the following language: "It would be a breach of the proprieties that govern the relations between the arbitrators in a commission like this one and the umpire, for the undersigned to attempt an *argument* on any point that may be embraced or conveyed in a judgment of the latter; he will, therefore, confine himself to making the following statements: It is the belief of the undersigned, that the convention in virtue whereof this tribunal deliberates, grants to Spain, with all its logical and necessary consequences, the right to review the adjudications of courts of the United States, in the matter of granting certificates of naturalization, and that such certificates, whilst they may be held as valid for every purpose in the United States, are not, from the mere fact of their existence, conclusive upon Spain. It is the belief of the undersigned that the above-mentioned right and privilege *constitutes one of the bases* of the convention of February 1871, *in accordance with which* all claims are to be considered. Every judgment given within the bases established by the convention must be beyond question or criticism. But none of the bases themselves can be set aside by the members of this commission."

¹ Marquis de Potestad-Fornari.

In the case of *Portuondo v. Spain*, in which the decision of the umpire was rendered subsequent to the filing of the protest of the arbitrator of Spain, the umpire held: "That as to the traversed allegation of American citizenship of the deceased, competent and sufficient proof thereof, as required by the agreement of February 12th 1871, is given by his certificate of naturalization, such certificate not being proved or charged to have been procured by fraud or issued in violation of public law, treaties or natural justice. Such grounds of impeachment, upon which any certificate of naturalization may be declared altogether void, not being found in this case, the umpire called upon to resolve such conflict about the allegiance of the deceased must, following previous adjudications by umpires of this commission, and in the absence of any treaty between Spain and the United States restricting the power of the United States to grant naturalization in accordance with the municipal law as interpreted by the municipal courts, give full force to the naturalization of the deceased even against Spain.

"That the allegation that the deceased had lost or forfeited his right of American citizenship by abandonment or renunciation of such citizenship is not sustained by the evidence. No positive proof has been offered to exclude the intention of the deceased to return to the United States, whose nationality he openly and continually claimed, where he had sent his son, and to which country he had manifestly made preparation to go himself for definite settlement, when he was arrested and shot. No positive proof has been offered of any individual act of the deceased implying the renunciation of his American citizenship acknowledged by the Spanish authorities, which renunciation the said authorities declared should, at some proper time, be ordered as a condition of his free sojourn in Cuba, and no evidence that his continued sojourn there is not to be accounted for by the simple omission of the authorities to enforce such contingent condition."

The scope of this discussion is confined to what may be termed individual naturalization. But it may be here stated that a collective naturalization of all the inhabitants is effected when a country or province becomes incorporated in another country by conquest, cession or free gift: 1 Phillimore, *Internat. Law*, p. 382, citing 2 Günther, p. 268, note e. The purchase of Louisiana, the annexation of Texas, and the acquisition of California, by the United States, present familiar illustrations of collective naturalization.

II.

The question of domicile has heretofore entered prominently into all discussions on the subject of citizenship, and the difficulty of defining domicile has embarrassed inquiry in this connection. In the light of recent legislation in respect to naturalization by the nations, the discussion as to what does or does not constitute domicile must be of less frequent occurrence and importance. But it will remain, in the absence of naturalization, the controlling question wherever citizenship is claimed, on the ground of domiciliation alone.

It has been pointed out how much of the confusion has been introduced. But until advised as to what is the distinction between the *social* and *political* status, between the *patria* and the *domicilium*, there is danger that confusion will remain. As these latter terms are derived from Roman law, we must look to that system of jurisprudence, and to the exposition of civilians for their definition and signification. "The title [citizenship, *civitas*] says Ortolan,¹ "was indelible in the pure law of the Romans, when once acquired; for the sentence of the people could deprive a citizen of life, but never of the rights of citizenship without his consent. The exercise of all civil rights, both as regards the *jus publicum* and the *jus privatum*, depended on this title. If it were not there, there was no *status*." * * * "The domicile (*domicilium*) is simply, in a legal sense, the residence of every person—the locality where he is supposed to be, in the eye of the law, for certain applications of the law, whether he is corporeally to be found there or not. It is to Roman legislation that we are indebted for the following description of the condition which constitutes the domicile: '*Ubi quis larem rerumque et fortunarum suarum summam constituit, unde non discessurus, si nihil avocet; unde cum profectus est peregrinari videtur; quod si rediit, peregrinari jam destitit.*' The domicile gives to persons not the qualification of *civis*, but that of *incola*, in the town where they are established. It is closely connected with the obligation to undertake public duties, magistracies, &c. * * * In Roman law the question of domicile was immediately connected with that of local citizenship. * * * There are, therefore, these three points to be distinguished: first, Rome, the common country [*patria*]; second, the local city, where a man

¹ Generalization of Roman Law. Translation of Pritchard and Nasmith: Butterworths, London, 1871, p. 573 *et seq.*

was *civis, municeps*; and third, the place where he had fixed his domicile, the legal habitation, where he was *incola*.

It is not admitted "that the domicile is *the place* where a person has his principal establishment; the domicile is not *the place*, it is *at the place*, as our civil code plainly says."¹ Further on it is added: "The domicile, in its simple and essential meaning, is, 'the *legal seat, the judicial seat* of a person for the exercise or for the application of certain rights.' The derivation of the word '*domicilium*' is sufficient to show the force of this explanation, as exact as it is simple."

"But why," says the publicist cited, "should the question be asked, whether a man belonged, as citizen, to one town or another? It was, in the first place, on account of the public offices, and the municipal duties to which a man was always liable to be called in his own city, independently of those duties required of him at the place of his domicile—municipal duties which recall to mind the miserable condition into which the *curiales* and the *decurions*, the principal inhabitants of the city, had fallen during the last period of the empire. It was, in the second place, because the constitution of Caracalla, granting equality of rights to all the inhabitants, did not grant it to all territories. We have seen that it was only under Justinian that the difference as to the soil was obliterated. In fact it was necessary to ascertain the domicile in order to determine who was liable to the burdens and obligations of each separate municipality to undertake the functions of magistrate; and, in many cases, it was the domicile and not the residence of the defendant which determined the place of litigation."

"Generally," it is said,² "the question of domicile is difficult to determine, and it is sometimes connected with or surrounded by circumstances that are transcendent and incalculable. The only fixed rule, or better said, the only controlling rule which can be adduced is the intention of the party." This author gives Phillimore's definition as follows: "Domicile corresponds nearly to the signification of our word '*home*,' and when a person has two residences the phrase where '*he has made his home*' indicates which is his domicile." But he says, "it is considered that the North American Judge RUSH best defined domicile when he said that it

¹ Ortolan, Generalization of Roman Law 596, note.

² Calvo, Derecho Internacional, vol. 11, p. 94-96.

was 'a residence at a particular place, accompanied with positive or presumptive proof of continuing it an unlimited time:' " *Guier v. O' Daniel*, 1 Binn. 349. "It is important," says another author,¹ "to distinguish between domicile and residence—there might be domicile without residence, or residence without domicile. Residence is preserved by the act, domicile by the intention." A Spanish publicist, in referring to domicile, describes it as "a certain kind or character of establishment, or a certain number of years of continuous residence, from which is inferred the intention to remain for ever." He adds, in the same connection, "The consent of the individual is necessary, in order that the privilege—*el domicilio a la extraccion*—may impose the obligations appropriate to, or which attach to citizenship."²

In this connection Lord Chief Justice COCKBURN says:³ "*Domicile*, which in legal phraseology is neither more nor less than a name for home, and the establishing of which may be said to be settling in a given locality with a present intention of permanently abiding there, has been suggested by some writers as sufficient to constitute a person a citizen of the country in which it is established, and we have seen that in some countries the being domiciled for a certain period gives the right of citizenship. But this position is altogether inadmissible. Jurists have for convenience in determining a man's personal status or capacity, or in administering his effects, or in matters of testamentary disposition, looked to domicile as determining by what law a man's rights and liabilities should be ascertained. But it is a very different thing to make domicile determine the question of nationality. Indeed, it may be doubted whether jurists have not gone too far in giving weight to the fact of domicile, even in matters of personal property. In a recent case in the House of Lords (*Morehouse v. Lord*, 10 H. of L. Cas. 272), Lord CRANWORTH and Lord KINGSDOWN held that, even for testamentary purposes, in order to lose a domicile of origin, and acquire a new one, a man must intend to change his nationality as well as his abode, or to use a phrase adopted by Lord CRANWORTH, '*quatenus in illo exuere patriam!*' "

The learned author gives as a further reason for not permitting

¹ Ortolan, Generalization of Roman Law. Translation of Pritchard and Nash-Smith: London, 1871, p. 599.

² Pando, Elementos del derecho Internacional: Madrid, 1852, p. 152.

³ Nationality, Ridgway: London, 1869.

domicile of itself to confer nationality, that "it has the effect of excluding the exercise of that judgment which ought always to be exercised by the proper state or authority as to whether a person applying to be naturalized is, with reference to character and other circumstances one, who ought to be admitted to the status of a subject."

It is submitted, that frequently the conflict as to what is in fact the citizenship of a particular individual, arises from a confusion of ideas in respect of the true signification of the terms "domicile" and "residence," and in giving to the one or the other a too restricted, or a too limited application.

While an individual can have but *one* domicile, he may have many residences:¹ the residence may be constructive; and a familiar instance in the United States, is afforded in the cases of citizens of the several states holding public office at the national capital, who though actually resident there, are, constructively, resident or in fact domiciled in their respective states; their domicile is in a particular state, to which they return or may return to exercise the elective franchise.

Cases have arisen where citizenship by naturalization has been denied by the country of origin, as against the latter, and it has been urged that such citizenship is qualified, and that it cannot avail against the country of origin. But this position has rarely been insisted upon to the point of actual conflict, and we have shown from the authorities that, in practice, except in the case of the voluntary return of the naturalized to the country of birth, *animo manendi*, it is waived by the nations. The serious inconvenience, resulting from the maintenance of any such doctrine at this day, must be apparent; "*a qualified citizen*," is a strange anomaly, and involves a misapplication and abuse of language; such an one would be a political Frankenstein, clothed in the form and with the features of a member of the society into which he is introduced, but without the essential faculties and attributes which constitute an active, intelligent organism. An individual cannot

¹ Ch. J. COCKBURN, ("*Nationality*,") says, "it is quite possible for a person to have two domiciles." Support for this position is found in the works of some of the civilians; but the later English and American authorities hold that there is in fact but *one* domicile at a time; the other habitations may be residences.

be at one and the same time a citizen of two states.¹ And as a general proposition an individual can have only one allegiance: (1 Phillim. 378.) As protection and allegiance are correlative terms, and involve reciprocity, it may sometimes aid in determining to whom allegiance is due, if it can be ascertained under whose protection an individual actually lives and exercises prerogative rights. He must be held to be a citizen of that nation, upon whom rests, until forfeiture by some act of the individual, the obligation to protect these prerogative rights—whether they be rights of property or rights of person. On the question of the singleness of *citizenship*, it is believed that the weight of authority in America sustains the doctrine laid down by Zouche, and that it is in harmony with that of Rome after the constitution of Caracalla, which found expression in the declaration of the Latin citizen, "*Roma communis nostra patria est.*"²

"The supposition that a man can have two domiciles," says Ch. Justice SHAW: (*Abington v. North Bridgewater*, 23 Pick. 170, 177), "would lead to the absurdest consequences. If he had two domiciles within the limits of distant sovereign states, in case of war, what would be an act of imperative duty to one, would make him a traitor to the other." It is laid down: (*White v. Brown*, 1 Wall. Jr. 217), "that all the controversy upon the point of change of national domicile, must ultimately come to Lord KINGSDOWN's rule: the party must intend to put off one nationality and put on another."

In the case of *Barclay v. United States*,³ the claimant, a British subject, had resided many years in the United States. The counsel for the United States, *R. S. Hale*, assisted by *E. Rockwood Hoar*, insisted that being domiciled in the United States, he was not within the provisions of the treaty a British subject. But Her Britannic Majesty's counsel, *J. Mandeville Carlisle*, would not concede that the *residence* of claimant in the state of Georgia could be called a domicile. Other grounds were suggested in argument for and against; but the decision, on demurrer, of two com-

¹ Zouche, *De Jure Feciali* (cited by Phillimore, *Commentaries on International Law*), 2, s. ii., xliii. Hefter maintains the contrary doctrine, § 59.

² Ortolan, *Generalization of Roman Law* 598; Phillimore, *Commentaries on International Law* 378; Austin, *Jurisprudence*, Student's ed. 163-4.

³ Mixed Commission on British and American claims, under treaty of Washington, May 8th 1871.

missioners was in favor of the British nationality of claimant. On the facts in this case there would seem to be no room to doubt the correctness of this decision; and the language and expressions in which the decision was announced, indicate that the commissioners had not failed to draw the distinction between domicile and residence, or the commorance of an alien for purposes of trade or pleasure in the territory of a foreign country.

In a case before the commission, which was organized under the convention of July 4th 1868, between the United States and Mexico, Anderson and Thompson presented a petition claiming indemnification for damage suffered by them in their real estate in Mexico. It appeared that they had purchased land in Mexico under the Mexican colonization laws, settled upon it, and brought it to a high state of cultivation. It was greatly damaged by the Mexican army in the operations in resisting the French invasion, and the plantation was subsequently declared by Mexico to be public land. Objection, founded on their domicile, was taken by the counsel for Mexico, who insisted that in consequence of such domicile they could not claim against Mexico as American citizens. On the part of the United States it was maintained that they were American citizens, and entitled to claim as such under the treaty. The commissioners differing, referred the question to the umpire, *Dr. Francis Lieber*. In his decision the umpire said: "Anderson and Thompson became citizens, it is asserted, of Mexico, by acquiring land, for there is a law of the Mexican republic converting every purchaser of land into a citizen, unless he declares, at the time, to the contrary. This law clearly means to confer a benefit upon the foreigner purchaser of land, and equity would assuredly forbid us to force this benefit upon claimants (as a penalty, as it were, in this case) merely on account of omitting the declaration of a negative; that is to say, they omitted stating that they preferred remaining American citizens, as they were by birth, one of the very strongest of all ties." The question presented to the umpire being, whether Anderson and Thompson were *bona fide* citizens of Mexico, and not citizens of the United States, when they suffered the injuries complained of, he decided that they were citizens of the United States.

ALEXANDER PORTER MORSE.

Washington, D. C.

(To be continued.)

RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

THE CONGRESS AND EMPIRE SPRING CO. v. EDGAR.

Animals *feræ naturæ*, as a class, are known to be mischievous ; and whoever keeps such an animal in places of public resort is liable for injuries committed by it to one who is not himself guilty of negligence and is otherwise without fault.

Whoever keeps a dangerous animal, with knowledge of its dangerous propensities, is liable to one injured thereby, without proof of any negligence or default in the securing or taking care of the animal. The gist of the action in such case is the keeping of the animal after knowledge of its mischievous propensities.

The defendant in error was attacked and injured by a buck while in a park owned by the plaintiffs in error, and into which the public were invited and freely admitted. The buck, with other deer, was at large in the park ; there was no evidence that the buck had attacked others, but the plaintiffs in error had a notice posted in the park to "Beware of the buck ;" there was expert evidence that bucks were dangerous in the fall of the year, at which season the injury was received : *Held*, that the plaintiffs in error were liable.

It is not competent for the Circuit Court to order a peremptory nonsuit in any case ; but the defendant, at the close of the plaintiff's case, may move the court to instruct the jury that the evidence introduced by the plaintiff is not sufficient to maintain the action, and to direct a verdict for the defendant. In considering the motion the court proceeds upon the ground that all the facts stated by the plaintiff's witnesses are true, and the motion will be denied, unless the court is of the opinion, that, in view of the whole evidence, and of every inference the law allows to be drawn from it, the plaintiff has not made out a case which would warrant the jury to find a verdict in his favor.

It seems that the opinion of one qualified to speak upon the point of inquiry, as to the habits of animals *feræ naturæ*, is admissible as expert testimony ; and if not admissible as such it is admissible as matter of common knowledge.

In examining the charge of a court for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages and to decide upon them, without attending to the context, or without incorporating such qualifications and explanations as naturally flow from other parts of the instructions.

Instructions given by the court are entitled to a reasonable interpretation ; and, if the proposition as stated is not erroneous, they are not, as a general rule, to be regarded as incorrect on account of omissions or deficiencies not pointed out by the excepting party. Appellate courts are not inclined to grant a new trial on account of an ambiguity in the charge to the jury, where it appears that the complaining party made no effort at the trial to have the matter explained.

ERROR to the Circuit Court of the United States, for the Northern District of New York.

The facts are stated in the opinion of the court, which was delivered by

CLIFFORD, J.—Animals *feræ naturæ*, as a class, are known to

be mischievous, and the rule is well settled that whoever undertakes to keep such an animal, in places of public resort, is or may be liable for the consequences to a party suffering injury from the animal, if not the latter is guilty of negligence and is otherwise without fault. Compensation in such a case may be claimed of the owner or keeper for the injury, and it is an established rule of pleading that it is not necessary to aver negligence in the owner or keeper, as the burden is upon the defendant to disprove that implied imputation. Cases have often arisen where no such averment was contained in the declaration, and the uniform ruling has been that the omission constitutes no valid objection to the right of recovery: *May v. Burdett*, 9 Q. B. 101. Negligence was not alleged in that case. Trial was had, and the verdict being for the plaintiff, the defendant moved in arrest of judgment that the declaration was bad for not alleging negligence or some default of the defendant in not properly or securely keeping the animal. Attempt was made by very able counsel to support the motion, upon the ground, that even if the declaration was true, still the injury might have been occasioned entirely by the carelessness and want of caution on the part of the plaintiff; but Lord DENMAN and his associates overruled the motion in arrest, and decided that whoever keeps an animal accustomed to attack and injure mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of the person attacked and injured, without any averment of negligence or default in securing or taking care of the animal, and the chief justice added, what it is important to observe, that the *gist* of the action is the *keeping* of the animal after knowledge of its mischievous propensities. Precedents, both ancient and modern, it seems, were cited in the argument and were examined by the court, and the learned chief justice remarked, that with scarcely an exception they merely state the ferocity of the animal and the knowledge of the defendant, without any allegation of negligence or want of care: *Jackson v. Smithson*, 15 Mees. & Wels. 565; *Popplewell v. Pierce*, 10 Cush. 509.

Injuries of a serious character inflicted by a mischievous deer, which the defendant company kept in their park, were received by the plaintiff at the time and place alleged, for which she claims compensation of the company. By the declaration it appears that the company is the owner and proprietor of the Congress Spring

at Saratoga, in the state of New York, whose waters have become celebrated for their medicinal qualities and the source of great gains and profits to the company. Among other things the plaintiff alleges that the spring had for a long time been kept open and accessible to visitors, the public being invited in various forms to patronize its waters, and that to make it more inviting and attractive the company had opened in connection therewith an extensive park, ornamented with fountains, trees, shrubbery and flowers, through which extensive gravelled walks have been constructed for the use and comfort of those who resort there to use the mineral waters and to enjoy the landscape; that the company, in order further to enhance the attractions of the park, had obtained, and in some degree domesticated, several wild deer, and among them a large and powerful buck, with large horns and of vicious character and habits, which were well known to the defendant company, their officers and agents, and the residents of the village.

Actual knowledge by the company of the mischievous character of the animal is alleged by the plaintiff, and she avers that the vicious animal, on the day named, to wit, the 18th of October 1870, was permitted to run at large in the park, and that she on that day visited the spring to partake of its waters, and that while she was peaceably proceeding along one of the walks in the park she was fiercely attacked by the mischievous buck and greatly injured, bruised and lacerated, as more fully set forth in the declaration.

Service was made and the defendant company appeared and pleaded: 1. The general issue. 2. That the damage and injury suffered by the plaintiff were occasioned by her own fault in neglecting to obey the rules and regulations of the company. On motion of the plaintiff a jury was impanelled and the parties went to trial, which resulted in a verdict and judgment in favor of the plaintiff. Exceptions were filed by the defendant company, and they sued out the pending writ of error.

Since the cause was entered here the defendant company has filed the following assignments of error: 1. That the court, in view of the evidence, should have directed a verdict for the defendant. 2. That the court erred in admitting the questions to the two witnesses called by the plaintiff as experts. 3. That the court erred in the instructions given to the jury in respect to the question of damages.

Certain animals *feræ naturæ* may doubtless be domesticated to such an extent as to be classed, in respect to the liability of the owner for injuries they commit, with the class known as tame or domestic animals, but inasmuch as they are liable to relapse into their wild habits and to become mischievous, the rule is that if they do so, and the owner becomes notified of their vicious habit, they are included in the same rule as if they had never been domesticated, the *gist* of the action in such a case, as in the case of untamed animals, being not merely the negligent keeping of the animal, but the keeping of the same with *knowledge* of the vicious and mischievous propensity of the animal: Whart. on Neg., § 922; *Decker v. Gammon*, 44 Me. 327.

Three or more classes of cases exist in which it is held that the owners of animals are liable for injuries done by the same to the persons or property of others, the required allegations and proofs varying in each case: 2 Black. Com. 390, Cooley's ed.

Owners of wild beasts, or beasts that are in their nature vicious, are liable under all, or most all, circumstances for injuries done by them; and in actions for injuries by such beasts it is not necessary to allege that the owner knew them to be mischievous, for he is presumed to have such knowledge; from which it follows that he is guilty of negligence in permitting the same to be at large.

Though the owner have no particular notice that the animal ever did any such mischief before, yet if the animal be of the class that is *feræ naturæ*, the owner is liable to an action of damage if it get loose and do harm: 1 Hale's P. C. 480; *Worth v. Gilling*, Law Rep. 2 C. P. 3.

Owners are liable for the hurt done by the animal, even without notice of the propensity, if the animal is naturally mischievous, but if it is of a tame nature there must be notice of the vicious habit: *Mason v. Keeling*, 12 Mod. 332; *Rex v. Huggins*, 2 Ld. Raym. 1583.

Damage may be done by a domestic animal kept for use or convenience, but the rule is that the owner is not liable to an action on the ground of negligence without proof that he knew that the animal was accustomed to do mischief: *Vrooman v. Lawyer*, 13 Johns. 339; *Buxendin v. Sharp*, 2 Salk. 662; *Cockerham v. Nixon*, 11 Ired. 269.

Domestic animals, such as oxen or horses, may injure the person or property of another, but courts of justice invariably hold, that

if they are rightfully in the place where the injury is inflicted, the owner of the animal is not liable for such an injury unless he knew that the animal was accustomed to be vicious; and in suits for such injuries such knowledge must be alleged and proved, as the cause of action arises from the keeping of the animal after the knowledge of its vicious propensities: *May v. Burdett*, 9 Q. B. 101; *Jackson v. Smithson*, 15 Mees. & Wels. 565; *Van Leuven v. Lyke*, 1 N. Y. 515; *Card v. Case*, 5 C. B. 632; *Hudson v. Roberts*, 6 Exch. 699; *Dearth v. Baker*, 22 Wis. 73; *Cox v. Burbridge*, 13 C. B. N. S. 437.

It appears by the bill of exceptions that the plaintiff, on the morning of the day of the injury, entered the park belonging to the defendant company; that after drinking of the water of the spring she walked through the grounds, and that she met the mischievous deer; that he attacked her, goring and striking her with his head and horns, whereby she was thrown down and greatly injured, and put to great suffering and expense, as more fully set forth in her testimony. On her cross-examination she testified that she had been in the habit of visiting the park to enjoy the water and the pleasure of the walk; that she had noticed the deer at an earlier period, and had often seen them running about on the lawn; that she had seen persons playing with them on different occasions, and that she had noticed the signboard posted in the park containing the notice, "Beware of the buck." Another witness, called by the plaintiff, testified that the park contains about eleven acres; that there were nine deer in the park, among which were three bucks, the oldest being four years old; that he first heard that the buck was ugly when the plaintiff was attacked and knocked down; that notices were put up at different places in the park a year or two before, cautioning visitors not to tease or worry the deer, and that he had no knowledge or belief prior to the accident that the buck or any other of the herd would attack any person if they were not disturbed. Expert witnesses were called by the plaintiff, and they gave it as their opinion that the male deer in the fall of the year is a dangerous animal.

Five witnesses were examined in behalf of the plaintiff, but the bill of exceptions does not show that the defendant company gave any evidence in reply, nor is it stated that the whole testimony introduced by the plaintiff is reported. When the evidence was closed, the defendant moved that the action be dismissed, that the

plaintiff be nonsuited, and that the court direct the jury to return a verdict in favor of the defendant.

Discussion of the first two propositions involved in the motion is wholly unnecessary, for two reasons: 1. Because the jurisdiction of the court was beyond doubt, and the record shows that the suit was well brought. 2. Because it is not competent for the circuit court to order a peremptory nonsuit in any case.

Circuit courts cannot grant a nonsuit, but the defendant at the close of the plaintiff's case may move the court to instruct the jury that the evidence introduced by the plaintiff is not sufficient to maintain the action and to direct a verdict for the defendant. In considering the motion, the court proceeds upon the ground, that all the facts stated by the plaintiff's witnesses are true, and the rule is, that the motion will be denied unless the court is of the opinion, that in view of the whole evidence, and of every inference the law allows to be drawn from it, the plaintiff has not made out a case which would warrant the jury to find a verdict in his favor: *Bank v. Bank*, 3 Cliff. 206; *Same v. Same*, 10 Wall. 655.

Tested by that rule, which is everywhere admitted to be correct, it is clear that the motion of the defendant was properly denied, for several reasons: 1. Because the proof of injury was overwhelming. 2. Because the allegation that the animal was vicious and mischievous was satisfactorily proved. 3. Because the evidence to prove that the defendant company had knowledge of the vicious and mischievous propensity of the animal was properly left to the jury, and it appearing that the Circuit Court overruled the motion for a new trial, the court here cannot disturb the verdict except for error of law. 4. Because the cause of action in the case arises not merely from the keeping of the animal, but from the keeping of the same after knowledge of its vicious and mischievous propensities. 5. Because the evidence is plenary that the plaintiff was rightfully in the place where she was injured, and that the owners of the vicious animal, inasmuch as the evidence tended to show that they had knowledge of its mischievous propensities, are justly held liable for the consequences: *Stiles v. Nav. Co.*, 33 L. J. (N. S.) 311; *Oakes v. Spalding*, 40 Vt. 351; *Sarch v. Blackburn*, 4 C. & P. 300; *Same v. Same*, 1 Moo. & Mal. 505; *Besozzi v. Harris*, 1 Fost. & Fin. 92.

Whoever keeps an animal accustomed to attack or injure mankind, with the knowledge of its dangerous propensities, says Addi-

son, is *prima facie* liable to an action for damages at the suit of any person attacked or injured by the animal, without proof of any negligence or default in the securing or taking care of the animal, the gist of the action being the keeping of the animal after knowledge of its mischievous disposition; Addison on Torts, ed. 1876, 283; *Dickson v. McCoy*, 39 N. Y. 401; *Applebee v. Percy*, Law Rep. 9 C. P. 650; Bigelow's Leading Cases on Torts 489.

2. Witnesses are not ordinarily allowed to give opinions as to conclusions dependent upon facts not necessarily involved in the controversy, but an exception to that rule is recognised in the case of experts, who are entitled to give their opinions as to conclusions from facts within the range of their specialties, which are too recondite to be properly comprehended and weighed by ordinary reasoners: 1 Wharton's Ev., § 440.

Men who have made questions of skill or science the object of their particular study, says Phillips, are competent to give their opinions in evidence. Such opinions ought in general to be deduced from facts that are not disputed or from facts given in evidence, but the author proceeds to say that they need not be founded upon their own personal knowledge of such facts, but may be founded upon the statement of facts proved in the case. Medical men for example may give their opinions not only as to the state of a patient they may have visited, or as to the cause of the death of a person whose body they have examined, or as to the nature of the instruments which caused the wounds they have examined, but also, in cases where they have not themselves seen the patient, and have only heard the symptoms and particulars of his state detailed by other witnesses at the trial. Judicial tribunals have in many instances held that medical works are not admissible, but they everywhere hold that men skilled in science, art or particular trades, may give their opinions as witnesses in matters pertaining to their professional calling: 1 Phil. Ev., ed. 1868, 778.

It must appear, of course, that the witness is qualified to speak to the point of inquiry, whether it respects a patented invention, a question in chemistry, insurance, shipping, seamanship, foreign law, or of the habits of animals, whether *feræ naturæ* or domestic.

On questions of science, skill or trade, or others of like kind, says Greenleaf, persons of skill, sometimes called experts, may not only testify to facts, but are permitted to give their opinions in evidence: 1 Greenl. Ev., § 400; *Buster v. Newkirk*, 20 Johns. 75.

Whether a witness is shown to be qualified or not as an expert is a preliminary question to be determined in the first place by the court, and the rule is that if the court admits the testimony then it is for the jury to decide whether any, and if any, what, weight is to be given to the testimony. Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence, but the Appellate Court will not reverse in such a case unless the ruling is manifestly erroneous: *Towboat Co. v. Starrs*, 19 P. F. Smith 41; *Page v. Parker*, 40 N. H. 59; *Tucker v. Railroad*, 118 Mass. 548.

Experts may be examined, says Justice GRIER, to explain the terms of art and the state of the art at any given time. Speaking of controversies between a patentee and an infringer, he says that experts may explain to the court and jury the machines, models or drawings exhibited in the case. They may point out the difference or identity of the mechanical devices involved in their construction, and adds that the maxim "*cuique in sua arte credendum*," permits them to be examined in questions of art or science peculiar to their trade or profession: *Winans v. Railroad*, 21 How. 100; *Ogden v. Parsons*, 23 Id. 170.

Even if the witnesses are not properly to be regarded as experts, the court is of the opinion that the testimony was properly admitted as a matter of common knowledge.

Well-guarded instructions were given to the jury on the subject, as appears from the transcript. Their attention was directed to the testimony, and they were told that it was for them to determine its weight, which shows that the defendant has no just ground of complaint.

3. Complaint is also made by the defendant that one sentence of the charge of the court in respect to the damages is erroneous. When you have made up your mind, said the judge, as to the amount *really sustained*, you are not to be nice in the award of compensation. It should be liberal.

Exception was taken to that remark, without request for a different instruction, or that it should be qualified or explained in any way. Before that remark was made, the judge cautioned the jury against giving credence to any extravagant statement of the injuries received, and then told them that when they had made up their minds as to the amount—meaning the amount of the injury really sustained—they should not be nice in the award of compensation,

adding, as if to qualify the antecedent caution given in favor of the defendant, that it should be liberal.

In examining the charge of the court, for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages and to decide upon them, without attending to the context or without incorporating such qualifications and explanations as naturally flow from other parts of the instructions: *Magniac v. Thompson*, 7 Pet. 300.

Instruction given by the court at the trial are entitled to a reasonable interpretation, and, if the proposition as stated is not erroneous, they are not, as a general rule, to be regarded as incorrect on account of omissions or deficiencies not pointed out by the excepting party; *Castle v. Bullard*, 23 How. 189.

Appellate courts are not inclined to grant a new trial on account of an ambiguity in the charge to the jury, where it appears that the complaining party made no effort at the trial to have the matter explained: *Locke v. United States*, 2 Cliff. 580; *Smith v. McNamara*, 4 Lans. 174.

Requests for such a purpose may be made at the close of the charge, to call the attention of the judge to the supposed error, inaccuracy or ambiguity of expression, and where nothing of the kind is done, the judgment will not be reversed, unless the court is of the opinion that the jury were misled or wrongly directed: *Carver v. Jackson*, 4 Pet. 81; *White v. McLean*, 57 N. Y. 672.

None of the exceptions can be sustained and there is no error in the record.

Judgment affirmed.

The decision in the principal case upon the question of liability for injury done by wild animals, whatever view may be taken of the dictum of the court hereinafter referred to, is clearly correct, for the reason that the evidence tended clearly to show that the owners of the animal, which did the injury, had notice of his mischievous propensities, which, under all the authorities, imposed upon them the obligation of taking proper precautions to prevent his injuring persons rightfully upon the premises, none of which, it seems, were taken in this

case. Whether the rule laid down in Hale's Pleas of the Crown 430, pt. 1, c. 33, and approved by the court in the principal case, is also in all respects correct, is perhaps open to more question. With respect to this subject, Lord HALE, quoting as authority 3 Edw. 3, Coron. 311; Stamf. P. C. 17 *a*, there says that "these things seem to be agreeable to law: 1. If the owner have notice of the quality of his beast, and it doth any body hurt, he is chargeable with an action for it.

"2. Though he have no particular

notice that he did any such thing before, yet if he be a beast that is *feræ naturæ*, as a lion, a bear, a wolf, yea, an ape or a monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage; and so I knew it adjudged in *Andrew Baker's Case*, whose child was bit by a monkey that broke his chain and got loose.

"3. And, therefore, in case of such a wild beast, or in case of a bull or cow that doth damage, where the owner knows of it, he must, at his peril, keep him up safe from doing hurt; for though he use diligence to keep him up, if he escape and do harm, the owner is liable to answer damages."

The doctrine of propositions 2 and 3 above quoted, seems to make the owner of beasts *feræ naturæ* liable absolutely as an insurer against all injuries done by such beasts; and the rule is generally stated to be, as stated by Lord HALE, that the owner must keep up such beasts at his peril, though it is believed that in most of the cases where the doctrine has been touched upon, it has been assumed as an existing rule of law, rather than adjudged after argument and consideration of the question upon principle and authority. See Bull. N. P. 77; Ld. Raym. 1593; *Besozzi v. Harris*, 1 F. & F. 93.

It is to be observed, before considering this subject further, that even if the above rule is correct, this liability does not properly depend upon the mere classification of the animal as being *feræ naturæ*, to which class would belong rabbits and many other animals having no natural disposition to injure man, but rather upon the natural savage propensities of the animal, as in the case of lions, tigers, &c. See *Earl v. Van Alstyne*, 8 Barb. 630. It is also to be observed that in any event the plaintiff complaining of an injury received from such an animal, must not have been guilty of contributory negligence himself. See *Besozzi v. Harris*, *supra*.

To return to the question under consideration, the case of *May v. Burdett*, 9 Q. B. (N. S.) 101; s. c. Big. Lead. Cases on Torts 478, is usually cited in cases where this subject is considered. This was an action for injuries received by the bite of a monkey, and a verdict for the plaintiff with damages was sustained and judgment rendered thereon, although no negligence was charged in the declaration. The court, in this case, per DENMAN, C. J., were of opinion that the gist of the action is in the keeping of the animal after knowledge of its mischievous propensities, and state that the conclusion to be drawn from an examination of all the authorities appears to be, that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril, and that, if it does mischief, negligence is presumed without express averment. See, also, *Wolf v. Chalker*, 31 Conn. 130. With reference to the case of *May v. Burdett*, Judge COOLEY, in his work on Torts, p. 379, note, says, that "the decision in this case seems to be that the keeper of such an animal, is *prima facie* responsible for the injuries done by it; but it is not decided that he may not meet the case by showing that he observed in respect to it proper care."

In *Laverone v. Mangianti*, 41 Cal. 138, the plaintiff was entering defendant's premises on lawful business, and, while ascending the steps to his house, one of the steps, which was loose, slipped from its position, and plaintiff's leg went through the opening, and was seized and bitten by defendant's dog, which was chained under the steps in such a manner that he could not reach one ascending the steps. No negligence was averred in the complaint, and the action was based on the theory that the owner of a dog, which he knows is vicious, is bound, at his peril, so to keep him that no one shall be bitten, unless it be through the culpable negligence of the party who suffers the injury.

RHODES, C. J., in delivering the opinion of the court, said: "It is insisted, on behalf of the defendants, that a person may lawfully keep a ferocious dog—one that is accustomed to bite mankind. That position may be conceded, and it may also be conceded that he has the same right to keep a tiger. The danger to mankind and the injury, if any is suffered, comes from the same source—the ferocity of the animal. In determining the responsibility of the keeper for an injury inflicted by either animal, the only difference I can see between the two cases is, that in case of an injury caused by a dog, the knowledge of the keeper that the dog was ferocious, must be alleged and proven, for all dogs are not ferocious; while in the case of a tiger, such knowledge will be presumed from the nature of the animal. This knowledge, however, established, whether by evidence or by presumption, is the same in substance, and works the same results. When the facts in two or more cases are alike, the law will pronounce similar judgments. It will not be doubted that for an injury inflicted by a tiger, his owner will be responsible, and, in my opinion, there is as little reason to doubt that the owner of a dog, which he knows to be ferocious, is equally liable for a similar injury occasioned by it. In either case, the owner, knowing the vicious propensities and ferocious nature of the animal, keeps it at his own risk, and he should bear the responsibility for any injury inflicted by it upon a person who is free from fault." See, also, *Wolf v. Chalker*, *supra*. CROCKETT, J., dissented from the opinion of the court in *Laverone v. Mangianti*, holding that the more reasonable rule was announced in *Sarch v. Blackburn*, 5 C. & P. 207, to the effect that every one has a right to keep a watch dog for the protection of his premises, and is only responsible for injuries resulting from negligence in the keeping.

With reference to this general subject, Judge COOLEY, in his valuable work on Torts, p. 348, referring to the above quotations from Lord HALE, very reasonably says: "If this doctrine is good law at this day, it must be because the keeping of wild beasts accustomed to bite and worry mankind is unlawful. For, if the keeping of such beasts is not a wrong in itself, then no wrong can come from it until some wrongful circumstance intervenes; in other words, until there is negligence. * * * The keeping of wild animals for many purposes, has come to be recognised as proper and useful; they are exhibited through the country with public license and approval; governments and municipal corporations expend large sums in obtaining and providing for them; and the idea of legal wrong in keeping and exhibiting them is never indulged. It seems, therefore, safe to say that the liability of the owner or keeper for any injury done by them to the person or property of others, must rest on the doctrine of negligence. A very high degree of care is demanded of those who have them in charge, but, if, notwithstanding such care, they are enabled to commit mischief, the case should be referred to the category of accidental injuries, for which a civil action will not lie." See also, *Earl v. Van Alstyne*, 8 Barb. 630, per SELDEN, J.; *Scribner v. Kelley*, 3 Id. 14; *Lavarone v. Mangianti*, *supra*, dissenting opinion of CROCKETT, J.

I have quoted thus largely from that portion of Judge COOLEY's work treating upon this subject, because it seems more satisfactory than any other discussion that has come to my notice. Perhaps, on grounds of policy, the strict rule that the owner of a wild beast must keep him in at his peril, may be better adapted to promote security of person, but if it be true, as it is believed to be, that the keeping of wild beasts is not *per se* a wrong, it is difficult to avoid the conclusion that there should

be no liability for injuries inflicted by them unless negligence is shown, either as a presumption or by actual proof. Although, hitherto, few cases have arisen upon the question, it is deserving of consideration, when the question

does fairly arise, whether the old common-law rule should not in view of the foregoing considerations, be modified to accord with the above views.

MARSHALL D. EWELL.

United States District Court, Southern District of Ohio.

LOUISA C. RUSK, LIBELLANT, v. STEAMBOAT CHARLES MORGAN.

The wife of a passenger brought an action *in rem* against the steamboat, to recover damages for the death of her husband, caused by the negligence of the officers of the vessel.

Plea to the jurisdiction. Jurisdiction sustained.

IN admiralty.

This was an action *in rem*, by the widow of Edwin Rusk, against the steamboat Charles Morgan, to recover damages for the death of her husband. The libel alleged that her husband was a passenger upon said boat, from New Orleans to Cincinnati, and that owing to the negligence and carelessness of the master and officers of the boat, in leaving the hatchways open at night, without light and guard, he fell through one of the hatchways into the hold of the vessel and was instantly killed. Prayer for damages. Claimant files a plea to the jurisdiction in the form of exceptions to the libel, on the ground, that in admiralty, as at common law, no action is maintainable for the wrongful death of another, either *in personam* or *in rem*.

P. J. Donham, for exception.

Henry Hooper, for libellant.

The opinion was delivered by

SWING, District Judge.—From an examination of the English authorities, it is very clear, that no right of action existed at common law for the death of a human being. This doctrine is first announced in the case of *Higgins v. Butcher*, Yelv. 89, which was an action brought by the husband for the death of his wife. Then came the celebrated case of *Baker v. Bolton*, 1 Camp. 493, which was also an action brought by the husband, to recover damages for the death of his wife. These are all the cases we have

been able to find prior to the passage of Lord CAMPBELL'S Act in 1846. But that this was the recognised doctrine is shown by the preamble of the act, which recites that "Whereas no action at law is now maintainable against a person, who, by his wrongful act, neglect or default, may have caused the death of another person, &c.," and the act then proceeds by its provisions to give such right of action. This is further shown by the case of *Glaholm v. Barker*, Law Rep. 1 Ch. App. 226, in which Lord Justice TURNER said: "Lord CAMPBELL'S Act first introduced into the law of this country a remedy in case of injuries attended with the loss of life. The law up to the time of the passing of this act stood thus, that in case of death resulting from an injury, the remedy for the injury died with the person." The same doctrine is maintained in *Osham v. Gillet*, 8 Exch. 88, and in Bac. Abr. "Master and Servant," O.; *Blake v. Midland Railway Co.*, 18 Q. B. 93. In fact we have not been able to find a single reported case in which a contrary doctrine has been held. The English courts and law writers may not have founded this doctrine upon such principles, as may now appear sound to us; but, nevertheless, it cannot be disputed that such was the doctrine of the common law.

In the United States this principle is not so well settled, and yet the weight of authority is to the same effect, as will be seen by reference to the following cases: *Carey v. Berkshire Railroad Co.*, and *Skinner v. Housatonic Railroad Corp. Co.*, 1 Cush. 475; *Kearney v. Boston & Worcester Railroad Co.*, 9 Id. 109; *Hollenbeck v. Berkshire Railroad Co.*, Id. 480; *Pennsylvania Railroad Co. v. Henderson*, 1 P. F. Smith 322; *Whilford v. Panama Railroad Co.*, 23 N. Y. 470; *Green v. Hudson Railroad Co.*, 2 Keyes (N. Y.) 294; *Conn. Life Ins. Co. v. N. Y. & N. H. Railroad Co.*, 25 Conn. 265; *Eden v. Lexington Railroad Co.*, 14 B. Mon. 204; *Wenley v. Cin., Ham. & Dayton Railroad Co.*, 1 Handy 481; *Hyatt v. Adams*, 16 Mich. 180.

On the other hand, there is the case of *Ford v. Charnal*, 20 Wend. 210, in which, however, this question was not made; but it has since been overruled by the New York courts (see cases cited). The case of *James v. Christy*, 18 Mo. 162, is usually cited as maintaining the opposite doctrine, but it will be found that the decision of the case turned upon a special statute of Missouri. In *Sheeld v. Younge*, 15 Ga. 349, the question was clearly made and decided, but none of the American cases seem to have been referred

to by the learned judge who delivered the opinion of the court. And in *Sullivan v. Union Pacific Railroad Co.*, 3 Dillon C. C. Rep. 334, the circuit judge made a very vigorous assault upon the common-law doctrine and refused to follow it; but this case was taken to the Supreme Court of the United States, and dismissed for want of jurisdiction, at the October term 1877; as no opinion was delivered by the court, we are unable to say whether this point was considered. So that there is only the Georgia case, which seems to directly deny the common-law doctrine. But that this principle or doctrine, that no such right of action existed, has been generally accepted in the United States, is further shown by the fact that in a large number of the states, such right of action is expressly given by legislative enactment.

But it is urged on the part of the libellant, that whatever the common-law principle may be, that the civil law permitted the action, and that the admiralty courts of the United States are not bound by the decisions of the common law. The decisions of the federal courts are not uniform upon this point, although the majority of them sustain it.

In *Plummer v. Webb*, Ware 69, it would seem that the direct question was not determined, but jurisdiction in admiralty was maintained by the United States district judge. The case was appealed to the Circuit Court, and after amendment of the libel, the action was dismissed by Justice STORY for want of jurisdiction. See 4 Mason 380.

In *Crapo v. Allen*, 1 Sprague 184, it was held that actions in admiralty, for mere personal torts, did not survive the death of the person injured. But in *Cutting v. Seabury*, 1 Sprague 522, the judge said it was not the settled law, that no action could be maintained for damages occurring upon the death of a human being, and that such right ought to exist; but the precise point was left undecided. It was held in the case of *The Steamship City of Brussels*, 6 Benedict 370, where a child had died from the negligence of the officers of the vessel, that this action could be maintained *in rem*, as arising upon the contract of passage. And in *The Sea Gull*, Chase's Decisions 145, Chief Justice CHASE decided that an action *in rem* could be maintained in admiralty by the husband for the death of his wife; and in *The Highland Light*, Id. 150, he affirmed the same doctrine. In the latter case, the widow and son filed their libel *in rem*, to recover damages for the

death of the father and husband, and the same judge held, that while the action could not be maintained *in rem*, the action would lie *in personam*, and that the admiralty court had jurisdiction. This case seems to have been decided wholly upon the construction of the statute; while the former was based entirely upon the general right to maintain such an action in the admiralty court.

In *Coggins v. Mary Helms*, reported in 23 Int. Rev. Rec. 384, it was held in an action by the wife of the chief mate of a schooner, which was run down by a steamship, causing the death of the husband, that an action *in rem* would lie in the admiralty court, to recover damages for his death, following the decision of Chief Justice CHASE. I find upon reference to the records of this court, that at the June Term 1870, the District Court dismissed the libel of *Thomas v. Thos. Sherlock et al.*, which sought to recover damages for the death of the husband of libellant, for want of jurisdiction. The case was appealed to the Circuit Court, and by consent of both parties the decree of the District Court was affirmed. There is nothing in the record, however, to show that this point was raised and decided. [See note, *post*, p. 629.]

So far as I have been able to ascertain, these are all the cases in which the question at issue has been raised and determined. In *The Steamboat Co. v. Chase*, 16 Wall. 522, Justice CLIFFORD discusses the question, and after noticing the cases of *Crapo v. Allen*, 1 Sprague 184, and *The Sea Gull*, Chase's Dec. 145, adds: "Difficulties it must be conceded will attend the solution of this question, but it is not necessary to decide it in this case."

As the case at bar will probably go to the Supreme Court of the United States, it will be better for all parties that the appeal should be taken after a trial upon its merits; I shall therefore overrule the exceptions to the jurisdiction of the court.

The above opinion contains a full and exhaustive statement of all the common-law decisions upon the point under consideration, and there can be no doubt, that so far as the common law is concerned, the decision fully sustains the principle announced in *Baker v. Bolton*, 1 Camp. 493, "that no action at law is maintainable against a person who wrongfully causes the death of another." It is true that Judge DILLON, in *Sullivan v. Un. Pacific Railroad Co.*, 3

Dill. C. C. 334, makes a very vigorous assault upon this doctrine. This was an action brought by the father to recover damages, for the loss of services of a minor son, killed by negligence of defendants. There was no statute in Nebraska, where the action was brought, giving a remedy for the wrong. The learned judge proceeds to discuss the doctrine, that "in a civil court, the death of a human being cannot be complained of as an injury;" and finally

decides, that the case of *Baker v. Bolton*, was not reasoned, and ought not to be followed in a state where the subject was open for settlement; that the rule itself was incapable of vindication and not deeply rooted in the common law; and that the father could recover on general or common-law grounds. But in spite of this it must be admitted, that the cases in England and America fully sustain the statement in the opinion, that at common law the weight of authority is decidedly in favor of the rule, that the death of a human being cannot be complained of as an injury, however illogical may be the reasoning upon which the rule is based.

The question, however, raised in the principal case is a different one, viz.: *can damages be recovered for the wrongful death of a party, in a Court of Admiralty, independent of the statutory remedy.*

The Supreme Court of the United States not having yet passed upon the question, the ultimate determination is still a matter of speculation. The final solution of the difficulty will probably turn upon the view which that court may entertain of the origin, and extent of jurisdiction of the Admiralty Courts. As in England, the question with us is still a vexed one, and has to be constantly and imperfectly answered. In the case of *The Ruckers*, 4 Robinson's Ad. R. 74, the editor says in a note: "It is sometimes supposed, that the practice of the Court of Admiralty of this kingdom has been derived from the civil law, without holding or acknowledging a common interest in the municipal usages, customs or institution of our country. If the fact were as stated by Spelman, 'that the jurisdiction of the Court of Admiralty, was exercised by the kings of England in their household, with the assistance of the judges of the common law till the reign of Edward 3;' it would be a sufficient refutation of such an hypothesis. If it be otherwise, however, there will

still be abundant reason to suppose that the principles on which the jurisdiction of the admiralty was founded, were perfectly consonant to the principles of our municipal jurisprudence, and derived from the same sources. The Roman law afforded no model from which such a system could be borrowed, nor would it be easy to assign to it distinctly any other foreign origin." This was written in 1801. The same language is used to-day by those who desire to limit the jurisdiction of the Admiralty Courts to the usages of the municipal courts of the state. As is well known, Mr. Justice STORY, in *De Lovio v. Boit*, 2 Gall. 399, decided, that the Admiralty Courts were governed by the rules and proceedings of the civil law, and that their jurisdiction in torts and contracts were co-extensive with other foreign maritime courts.

And from Domat Civil Law 1550, and 1 McQueen 750, it appears that the civil law permitted such an action.

All the cases in which this question has been raised in the various District and Circuit Courts of the United States, (at least so far as they are reported), are referred to in the opinion. Chief Justice CHASE seems to be the first who held that the Admiralty Courts had jurisdiction of an action to recover damages for the wrongful death of a human being; although other judges had intimated that "natural equity and the general principles of law," were in favor of it.

In *The Sea Gull*, Chase's Dec. 145, the libellant brought his action against the vessel to recover damages for the death of his wife, occasioned by a collision. The objection was urged that the action did not survive, and that the court had no jurisdiction. It was held that the husband could recover in an action *in rem*. In *The Highland Light*, Chase's Dec. 150, the wife of a hand on the vessel, who had been killed through the negligence of the engineer, sued for damages *in rem*.

The court affirmed the principle of the preceding case, but held that the action should have been brought in *personam* against the owners of the boat, following the Act of Congress, which prescribes certain remedies for wrongs sustained through the negligence of the officers of steam-vessels.

In *Brannick v. Sea Gull*, 16 Pitts. L. J. 194, the wife sued *in rem*, for damages for the death of her husband, and while navigating in a row-boat in the harbor of Baltimore, was killed by a collision with the defendant steamer. The same judge held that she could recover, and that the court had jurisdiction.

These cases were followed by the district judge of New York, in the case of *The City of Brussels*, 6 Ben. 371; this was in 1873. In *The Steamship Towanda*, 34 Leg. Int. 394, decided in Oct. 1877, by Circuit Judge McKENNA (affirming the decree of District Judge CADWALLADER), it was held that an action was maintainable in the Admiralty Courts, to recover damages for the wrongful death of a human being. It was an action *in rem*, brought by the wife, whose husband had been killed in a collision at sea. From the agreed statement of facts, it appears that the steamer ran down the schooner, and drowned the chief mate, the husband of libellant; "his death being the direct result of the negligence of the steamer in causing the collision." The jurisdiction of the court in a case of this kind, was the sole question at issue in the Circuit Court. The learned judge admits that at common law, the weight of authority

is against the right of action, and that its origin is purely statutory, but following Chief Justice CHASE, declines to be bound by the decisions of the common law, and adds: The exercise of such a jurisdiction by Courts of Admiralty, is at least consonant with "natural equity, and the general principles of law, and with the benign spirit of English and American legislation on the subject."

The unreported case of *Thomas v. Sherlock* (referred to in the opinion), was compromised by the payment of a sum of money to the libellant. In *Benedict Adm.*, § 309, it is said, "that causes of action for mere personal torts are not regarded in admiralty as surviving the death of the person injured; and a state statute will not enable an administrator to maintain an action for such *tort*, committed on the high seas."

We should rather hope that when the question comes before the Supreme Court of the United States, that distinguished tribunal will find it more consonant with the principles of natural equity and justice to allow the action, than to follow the unreasoned decision of Lord ELLENBOROUGH in *Baker v. Bolton*.

At all events, so far, the precedents, with scarcely an exception, sustain the ruling that the action for a *tort* resulting in death survives the person killed, and an action to recover damages therefor may be brought in a Court of Admiralty, always provided that the injury was received at sea, or upon waters navigable from the sea. H. H.

Supreme Court of Wisconsin.

JANE WILLIAMS v. WILLIAM WILLIAMS.

When the evidence shows that at the time of the commencement of the cohabitation and conduct, from which it is sought to prove a marriage in fact, there was in fact no such marriage, the mere continuance of such cohabitation and conduct,

without something more to indicate that there had been a change in the relations of the parties to each other, would not be sufficient to show a marriage in fact, subsequent to the commencement of such cohabitation and conduct.

Such contract may be proved by circumstances, but they must be such as to exclude the inference or presumption that the former relation continued, and satisfactorily prove that it had been changed into that of actual matrimony by mutual consent.

It was therefore error, where the parties originally cohabited under a void contract of marriage, to refuse to charge that if the subsequent conduct and declaration of the parties arose from and was the result of such void ceremony, that there could be no presumption of a subsequent marriage.

THIS action was brought by the plaintiff to recover her dower in the lands of which Lewis Williams died seised. The defendant pleaded that the plaintiff never was the lawful wife of said Williams. It appeared from the evidence, upon the trial of this issue, that the plaintiff and the deceased participated in a marriage ceremony, at Racine, in the state of Wisconsin, May 9th 1870; which was celebrated by the pastor of the Presbyterian church, and witnessed by the daughter of the plaintiff and two other persons. That the plaintiff thereafter dwelt with the deceased until his death, August 29th 1873, and that she was universally reputed to be his wife during all that time. It was also shown that the plaintiff had joined the deceased, as his wife, in the execution of a warrantee deed dated August 23d 1873. The defendant, on the other hand, proved that the plaintiff was divorced from William Jones, in November 1870, subsequently to her alleged marriage to Williams, under proceedings instituted by her in the Circuit Court for Kenosha county, in the state of Wisconsin, in October 1870, under the name of Jane Jones. In rebuttal the plaintiff introduced evidence to show that the said Jones had formerly married one Amelia Rees, who was still living at the time this issue was tried.

The court, at the request of the plaintiff, charged the jury that "in an action by a widow to recover dower in the lands of her deceased husband, it is not necessary for her to make strict proof of marriage, that is proof of an actual solemnization of marriage—but proof by cohabitation as husband and wife, acts and declarations of the husband recognizing her as his wife, and conduct of the parties may be sufficient."

The defendant asked the court to charge, *inter alia*: "The judgment roll in the case of Jane Jones v. William Jones, which is offered in evidence by the stipulation, is conclusive evidence upon the question as to the plaintiff being the wife of William Jones, in

November 1870, and unless you find that a marriage was solemnized between the plaintiff and Lewis Williams, after the divorce in November 1870, the plaintiff cannot recover, and your verdict must be for defendant." Which request, together with certain other requests, quoted in the opinion of the Supreme Court, were refused by said court.

The court further charged, *inter alia*: "If on the 9th of May 1870, the plaintiff was the lawful wife of Jones, the said marriage of the plaintiff with Lewis Williams was void, and the plaintiff did not thereby become the lawful wife of the said Williams. But if at the time of the plaintiff's marriage to Jones, he, Jones, had a lawful wife then living, the plaintiff's marriage to Jones was void, and did not operate to render her marriage with Williams invalid. The judgment of divorce rendered in November 1870, in the action between the plaintiff and William Jones, has been received in evidence and is claimed by the defendant as conclusive as to the validity of plaintiff's marriage with Jones. I think, and so instruct you, that such judgment is not conclusive in this action as to the validity of such marriage. You will determine from the evidence whether Jones, at the time of his alleged marriage with the plaintiff, had a wife by a previous marriage then living.

And you will determine from a preponderance of the testimony whether the plaintiff was the lawful wife of Lewis Williams, Sr., and his widow. If you so find, then as such widow of said Lewis Williams she is entitled to dower in all of the real estate of which Williams was seised during her coverture, and is entitled to recover during this action."

The defendant duly excepted to the refusal of the court to charge the jury as by him requested, and to the charge as given and above quoted, and the jury having found for the plaintiff, and a new trial being refused, the defendant duly appealed to the Supreme Court.

J. V. & C. Quarles, for respondent.

John T. Fish, for appellant.

TAYLOR, J.—This action is brought by the plaintiff to recover dower in certain lands in the possession of the defendant.

The plaintiff bases her claim for dower upon the allegation that she is the widow of one Lewis Williams, Sr., deceased.

The only question which is seriously litigated is, whether the

plaintiff is the widow of said deceased. The evidence shows that the plaintiff was married by a formal marriage ceremony to said Lewis Williams, Sr., on the 9th day of May 1870, and tends to show that she lived with him as his wife from that time to the time of his death, August 20th 1873.

The appellant claims that at the time plaintiff married the deceased, she was the lawful wife of one William Jones, who was then living and not divorced from the plaintiff. The plaintiff does not deny that she had been married to said Jones, and had lived with him as his wife, but she alleges and shows that she was duly and lawfully divorced from him by the judgment of the Circuit Court of Kenosha county in this state in the month of November 1870.

It appears from the stipulation of the parties, that such divorce suit was instituted by the plaintiff in this action by the name of Jane Jones, and that she alleged in her complaint therein, that she and the said William Jones were duly and lawfully married in Wales, in the year 1863. Such action was commenced in October 1870, the complaint was sworn to by the plaintiff, the summons was personally served on the defendant William Jones, and as a ground for the divorce, the complaint charged the said William Jones with wilful desertion for more than one year before the commencement of such action. The judgment in that action was entered in November 1870, and decreed and adjudged that the marriage theretofore existing between the said Jane Jones and the said William Jones be and the same was thereby dissolved, and each of the parties freed from the obligations thereof.

The plaintiff further gave evidence tending to prove that at the time of her marriage to William Jones, he (Jones), had another wife living, from whom he had been divorced, and who was still living. The plaintiff recovered in the action in the court below, and the defendant appeals to this court. The learned counsel for the plaintiff and respondent insists that she was entitled to recover upon either of two theories: First, if she was the lawful wife of William Jones at the time she married Lewis Williams, Sr., she was afterwards lawfully divorced from said Jones about two years and nine months before the death of Lewis Williams, Sr., and that as during all that time, she and the said Williams lived and cohabited together as husband and wife that she was all that time spoken of by the said Williams as his wife and treated by him as

such; that she during all that time spoke of said Williams and treated him as such, from the evidence in the case upon that point, if necessary to sustain the plaintiff's claim that she was the widow of said Williams, the jury would be justified in finding a marriage in fact between the said Lewis Williams, Sr., and the plaintiff after her divorce from the said Jones. Second, that there was sufficient evidence in the case to justify the jury in finding that she never was the lawful wife of William Jones, for the reason that he had a wife living at the time she was married to him, and that such wife is still living and not divorced; consequently her formal marriage with the deceased Lewis Williams, Sr., on the 9th of May 1870, was in every respect a lawful marriage.

The learned counsel for the appellant insists: First, that the judgment rendered in the divorce suit between Jones and Jones, given in evidence and entered sometime in November 1870, is conclusive evidence against the plaintiff, that at the time of the entry of such judgment and from the date of her alleged marriage with the said Williams in 1870, to time of the entry of such judgment, she was the lawful wife of said William Jones, and that as a consequence her marriage with said Lewis Williams, Sr., on the 9th day of May 1870, was absolutely void. Second, that there was not sufficient evidence of an actual marriage between the plaintiff and the said Lewis Williams, Sr., deceased, subsequent to the date of the judgment in said divorce suit, and consequently she had failed to prove that she was the widow of the said deceased. Third, that the court erred in refusing to give to the jury the following instruction asked by the defendant:

"Testimony has been admitted of acts and conversations of Lewis Williams, Sr., by which he recognised the plaintiff as his wife. This testimony was admitted as being competent and as tending to show that the parties were married. If you find that such acts of Jane Williams and Lewis Williams, Sr., which have been given in evidence, arose from and were the result of a marriage ceremony, which took place between the plaintiff and Lewis Williams, Sr., in May 1870, and that Jane Williams was then the wife of William Jones, and that no marriage was ever solemnized between the plaintiff and Lewis Williams, Sr., after the divorce was granted to the plaintiff in November 1870, from said William Jones, then your verdict must be for the defendant.

"If you find that Lewis Williams, Sr., spoke of the plaintiff and

introduced her as his wife, because of some pretended marriage between the plaintiff and himself at the time when the plaintiff was the wife of William Jones, and not because of any actual marriage solemnized or contracted after November 1870, then your verdict must be for the defendant. If you find that no legal marriage was ever solemnized or contracted between Jane Williams, the plaintiff, and Lewis Williams, Sr., then all evidence of acts and declarations on the part of Lewis Williams, Sr., are unavailing, and the defendant is entitled to your verdict."

The fact that the first point made by the learned counsel for the appellant, is one of such grave importance to the public and so far-reaching in its effects upon the rights of persons not parties to the action for divorce, if sustained to the extent claimed by the learned counsel, and the want of time necessary to enable each member of the court to make a thorough examination of the subject for himself, and the further reason that we are all agreed the judgment must be reversed for the refusal of the court to instruct the jury as requested by the counsel for the defendant, has induced us to leave that question undecided.

That the instructions which are above set forth, and which were requested by the defendant's counsel, or some instructions equivalent thereto, should have been given to the jury, is apparent upon the evidence in the case. The plaintiff had proved a marriage solemnized between herself and the deceased at a time when the jury, from the evidence given on the trial, might have found that she was the wife of said William Jones. It is admitted by the learned counsel for the plaintiff, that it was necessary for her to show by sufficient affirmative proof, that a lawful marriage in fact existed between her and the deceased at the time of his death. There was no pretence that there was any direct proof of any such lawful marriage, unless the marriage on the 9th of May was a lawful marriage, and it is admitted by both parties that such marriage was void, if at that time the plaintiff had another husband living. The evidence also showed that the cohabitation, acts and declarations of the parties as to their living together as husband and wife and their being married, commenced at the date of such marriage in May 1870.

The authorities hold and this court is not inclined to hold otherwise, that in an action for dower the plaintiff is not required to make proof of the actual solemnization of a marriage between the plain-

tiff and the deceased, in whose estate she claims dower, but they also hold that the evidence must be sufficient to establish the fact of a lawful marriage between them. None of the cases hold that living and cohabiting together as husband and wife, or even the declarations of the parties that they are husband and wife, constitute a marriage in fact, or that such acts and declarations are a substitute for the marriage contract; the extent to which the authorities go is, that such evidence may be sufficient to prove a lawful marriage in fact.

The law of this state declares that marriage is a civil contract (see § 2328, Rev. Stat. 1878), and there is no statute law which points out in what manner the contract must be entered into to render it valid. It need not be in writing or in the presence of witnesses, but there must be an agreement between the parties that they will hold toward each other the relation of husband and wife, with all the responsibilities and duties which the law attaches to such relation, otherwise there can be no lawful marriage.

It would seem to follow, therefore, that every lawful marriage must have been entered into by the parties at some particular date or time, and that it cannot in any case be the simple result of cohabitation or the continued conduct of the parties which ordinarily accompany the married state. As a general rule, when a marriage is sought to be proved by conduct, cohabitation and repute, the date of the marriage in fact, which such conduct and repute tend to establish, is the date of the commencement of such conduct and repute and not afterwards.

It follows, therefore, that when the evidence shows that at the time of the commencement of the cohabitation and conduct, from which it is sought to prove a marriage in fact, there was in fact no such marriage, the mere continuance of such cohabitation and conduct, without something more to indicate that there had been a change in the relations of the parties to each other, would not be sufficient to show a marriage in fact, subsequent to the commencement of such cohabitation and conduct.

In the case at bar, if the jury had found that the marriage of the parties on May 9th 1870, was void because of the fact that the plaintiff had another husband then living, and they had also found that all the acts, conduct and declaration of the parties, after the date of the divorce of the plaintiff from such former husband, "arose from and were the result of such void ceremony," such find-

ing, we think, would have negatived the inference of any marriage in fact between the parties subsequent to such divorce, and as a consequence, have defeated the plaintiff's recovery.

The same consequences would have resulted from a finding that all the acts, conduct and declarations of Lewis Williams, Sr., were in consequence of a marriage with the plaintiff when she was the wife of another, and not in consequence of any marriage with her after her divorce from such husband, because such finding would necessarily have negatived any inference that he had contracted any marriage in fact with the plaintiff after such divorce. However ignorant Lewis Williams, Sr., may have been of the fact that the plaintiff had another husband living at the time he married her, such marriage was absolutely void as to him, notwithstanding his ignorance and good faith, and he could only make her his lawful wife by such marriage in fact, after the divorce of her former husband. We are of the opinion also, that the third instruction requested should have been given, and that the general charge did not cure the error of the refusal. It would seem from the very nature of the matter in issue, that if the jury found that no marriage was in fact ever solemnized or contracted, between the plaintiff and the deceased, all the acts and declarations of the parties were of no avail. The only object in proving the acts and declarations of the parties, was to establish the fact that a marriage was contracted between them, and if the jury found as a matter of fact, that no marriage was in fact contracted, then all the other matters introduced into the case were of no consequence.

The only instructions given to the jury on the subject of what evidence was necessary to establish a marriage between the parties, were the following. At the request of the plaintiff the court gave this instruction: "In an action by a widow to recover dower in the land of her deceased husband, it is not necessary for her to make strict proof of marriage, but proof by cohabitation as husband and wife; acts and declarations of the husband, recognising her as his wife, and conduct of the parties may be sufficient." In the general charge, the court upon this subject said: "And you will determine, from a preponderance of the testimony, whether the plaintiff was the lawful wife of Lewis Williams, Sr., and is his widow." The court also charged the jury, that if they found that the plaintiff had another husband living at the time of her marriage to Williams, on the 9th of May 1870, then such marriage was void,

and that she did not thereby become the wife of said Williams; but he did not instruct the jury that if such marriage, of the 9th of May 1870, was void, she could not recover in this action.

The case was submitted to the jury upon the issue as to whether there had been a marriage in fact between the plaintiff and deceased, after the plaintiff had obtained a divorce from William Jones, upon the theory that it was entirely immaterial to the determination of that issue, that the cohabitation and living together as husband and wife, upon which the plaintiff relied to establish such marriage, commenced at a time when it was impossible for them to contract a lawful marriage. This was undoubtedly an erroneous view of the case.

Courts cannot but look with suspicion upon a claim of marriage, founded upon evidence of cohabitation and conduct, which is consistent with the fact of actual marriage, where the evidence affirmatively shows that at the time such cohabitation and conduct commenced, there was in fact, no marriage, and such cohabitation and conduct was meretricious and in violation of law. When such fact is shown, the effect of the evidence upon the question of a marriage, in fact, at the date of the commencement of such unlawful cohabitation and conduct, is entirely destroyed, and in order to establish a marriage subsequent to the commencement of such unlawful and meretricious conduct, by continued cohabitation, conduct and declarations of the parties, or by reputation, there should be some affirmative evidence showing that the subsequent relations of the parties were changed, and that that which was meretricious and unlawful in its commencement had been rendered lawful.

It would require much less proof to satisfy either a court or jury that there was a marriage in fact between persons in good repute, and as to whom there was no obstacle to marriage, when the proof of marriage depended upon the fact of cohabitation as husband and wife, and the recognition of each other as such, than when it appeared affirmatively that one or both of the parties claiming a marriage, upon like proofs, were at the time of the commencement of the cohabitation incompetent to contract marriage. And this would be especially so if it were shown that the party claiming such marriage, had full knowledge at the time of the commencement of such cohabitation, that he or she was incompetent to contract a lawful marriage with the other party. The fact appearing

that such party unlawfully commenced the cohabitation, would be strong evidence that he or she would not hesitate to continue such unlawful conduct after the disability had been removed. We think the judge of the circuit court ought to have called the attention of the jury to this view of the case and to have at least instructed them, as requested by the counsel for the defendant, that if they found that the plaintiff had another husband living at the time she married the deceased, in May 1870, they must then inquire whether there was any sufficient evidence in the case, from which they could find a marriage in fact between the parties subsequent to the time of her divorce from such former husband; and that he should also have instructed them, that if the continued cohabitation and conduct of the parties, and their declarations as to their being married and being husband and wife, referred to their marriage made in May 1870, and at a time when they could not lawfully marry, and not to any marriage in fact contracted after the plaintiff's divorce, they must find that no marriage in fact was proven.

The general rule upon the question of proof of marriage by proof of cohabitation, conduct and declarations of the parties, is stated by a learned judge as follows: "The general and ordinary presumption of the law is in favor of innocence, in questions of marriage, and of legitimacy where children are concerned. Cohabitation is presumed to be lawful till the contrary appears. Where, however, the connection between the parties is shown to have had an illicit origin, and to be criminal in its nature, the law raises no presumption of marriage:" 2 Kent 87; *Jackson v. Claw*, 18 Johns. 346; 2 Greenl. Ev., § 464; *Physick's Estate*, 4 Am. Law Reg. N. S. 418. The presumption against marriage, where the connection between the parties is shown to have been illicit in origin, may, however, be overcome by proofs, showing that the original connection has changed in its character, and a subsequent marriage may be established by circumstances, without actual proof of a marriage in fact. The cases cited by the learned counsel for the respondent in their brief in this case, fully establish this point; the following cases also illustrate the same subject: *Starr et al. v. Peck*, 1 Hill 270; *Clayton v. Wardell*, 4 N. Y. 230; *Canjolle v. Ferrie*, 23 Id. 90; *O'Gara v. Eisenlohr*, 38 Id. 296; *Foster v. Hawley*, 8 Hun 68. The rule laid down in the last case cited is stated as follows: "A cohabitation illicit in its origin is presumed

to be of that character, unless the contrary be proved, and cannot be transformed into matrimony by evidence which falls short of establishing the fact of an actual contract of marriage. Such contract may be proved by circumstances, but they must be such as to exclude the inference or presumption that the former relation continued, and satisfactorily prove that it had been changed into that of actual matrimony by mutual consent.

We are inclined to hold the rule as above stated to be the proper rule, where applied to a case like the one at bar. Where the party claiming a marriage (on the theory that she was lawfully married to William Jones) deliberately entered into a bigamous marriage contract with the deceased, and commenced cohabitation under such contract, if, notwithstanding the fact that she knowingly commenced cohabiting with the deceased when she was the lawful wife of another, she claims a lawful marriage with such deceased after her divorce, and after she had thereby acquired the right to become his wife, she ought to be required to establish the fact of subsequent marriage, either by express proof of the contract of marriage, or by circumstances which would clearly exclude the presumption that she continued to live with him under such illegal contract of marriage.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

RYAN, C. J., took no part in this case.

It is an elementary rule of evidence, that where a particular status has been proved, its continuance will be presumed, unless the contrary be shown by testimony sufficient to rebut this *prima facie* inference: *Curgile v. Wood*, 63 Mo. 501-514. If, therefore, cohabitation is illicit in its origin, there is a necessary presumption that the connection continues meretricious, unless there is some evidence that the character of the relation has been changed: *Cunningham v. Cunningham*, 2 Dow. 483; *Stewart v. Robertson*, Law Rep. 2 Sc. Ap. 494; s. c. 13 Eng. Rep. 165; *Yardley's Estate*, 75 Penn. St. 207; *Commonwealth v. Stump*, 53 Penn. St. 132; *Bicking's Appeal*, 2 Brewst. (Pa.) 202;

Wright v. Wright, 48 How. Pr. (N. Y.) 1; *Barnum v. Barnum*, 42 Md. 251; *Redgrave v. Redgrave*, 38 Id. 93; *Jones v. Jones*, 45 Id. 144; *Port v. Port*, 70 Ill. 484; *Floyd v. Calvert*, 53 Miss. 37; *Rundle v. Pegram*, 49 Miss. 751. The mere fact, however, that the relation was unlawful in its inception, does not in any wise debar the parties from entering into a subsequent contract of marriage. "Whether the agreement of marriage preceded or followed the first sexual intercourse, whether it was five or ten years thereafter, if clearly made and proved, it establishes a valid marriage:" *Richard v. Brehm*, 73 Penn. St. 140-5.

In the absence of a nullifying statute

the status of marriage may be created by the simple, secret, and perhaps, even tacit, consent of a man and woman to become husband and wife: *DeThoren v. Attorney-General*, 1 Ap. Cas. 686-9; s. c. 17 Eng. Rep. 72; *Nathans's Case*, 2 Brewst. (Pa.) 149; *Dyer v. Brannock*, 66 Mo. 391. Neither are the essentials of the contract different, where the alliance of the parties was at first illegal. It is manifest, therefore, that a change in the character of the cohabitation, wrought by the fact of marital consent, must frequently be established by circumstantial evidence, as the law does not require that the means taken to work the change should necessarily be the subject of direct proof. The circumstances, however, must not only be sufficient to create a presumption in favor of marriage, but they must also "be such as to exclude the inference or presumption that the former relation continued:" *Foster v. Hawley*, 8 Hun (N. Y.) 68-72. Under ordinary conditions, marriage will be presumed not only from specific facts and circumstances (*Hamilton v. Hamilton*, 9 Cl. & Fin. 327; *Montague v. Montague*, 2 Addams 375; *Vincent's Appeal*, 60 Penn. St. 228; s. c. *De Amarelli's Estate*, 2 Brewst. (Pa.) 239), but also from a constant matrimonial cohabitation and general reputation of marriage; (*Yardley's Estate*, 75 Penn. St. 207 *Bicking's Appeal*, 2 Brewst. (Pa.) 202; *Cargile v. Wood*, 63 Mo. 501; *In the matter of Taylor*, 9 Paige 611), or as it is sometimes termed, the habit and repute of marriage: *Campbell v. Campbell*, Law Rep. 1 H. L. Sc. 182; *DeThoren v. Attorney-General*, 1 Ap. Cas. 686.

This presumption, it should perhaps be noted, is nevertheless purely benevolent in its character: 2 Best on Ev. 624; 1 Taylor on Ev. 140; 1 Bish. on Mar. & Div. § 434, and that marriage will therefore not be inferred when such a conclusion would tend to impute crime

rather than establish innocence: 1 Bish. on Mar. & Div. §§ 444-6; *Jackson v. VanBuskirk*, 18 Johns. 346; *Clayton v. Wurdell*, 4 N. Y. 230; s. c. 5 Barb. 214; *Foster v. Hawley*, 8 Hun 68; *Chamberlain v. Chamberlain*, 71 N. Y. 423; *Senser v. Bower*, 1 Pa. 432; *Jones v. Jones*, 45 Md. 144-57; *Redgrave v. Redgrave*, 38 Id. 93; *Weatherford v. Weatherford*, 20 Ala. 548; *Haupt v. Haupt*, 5 Ohio 539; s. c. Wright 156; *Pontney v. Fairhaven*, Brayton (Vt.) 185; *Breakey v. Breakey*, U. C. Q. B. 349-58; *Wheeler v. McWilliams*, Id. 77; *Taylor v. Taylor*, 1 Lee 571; s. c. 5 Eng. Ecc. Rep. 454. Thus in *Foster v. Hawley*, decided by the New York Supreme Court, and cited in the principal case; a married man consorted with a strange woman for over twenty-four years, and she bore him ten children; at the expiration of this period, the husband obtained a divorce from his wife and continued to reside with the woman for six months longer, when they separated and each remarried. Under these circumstances, the court refused to presume that a contract of marriage had been entered into, after the impediment to marriage had been removed by the divorce, and before the parties had separated and formed new matrimonial relations.

"We cannot," said the court, "raise a presumption of a contract of marriage where the direct consequence of so doing would be to involve both parties to it in the crime of bigamy." It is intimated, however, in the principal case, that there must be "something more" than the presumption deduced from cohabitation and reputation, to rebut the presumption arising from the illegal origin of the relation, when the cohabitation and reputation began at a time when there could have been no marriage in fact. This doctrine seems to be founded upon the theory that the present repute and conduct of the parties, must necessarily

relate back to the time when such reputation was without foundation in fact, and when the conduct of the parties was admittedly fraudulent. It is manifest, however, that, if such indeed be the law, it is rendered very difficult, if not in fact impossible, for parties to purge a meretricious alliance of its illegal taint, without the publication of their own shame, and the declaration of their childrens' infamy. It was therefore said by Lord CHELMSFORD, in *De Thoren v. Attorney-General*, *supra*, that "if the cohabitation begins in an illicit intercourse, and is continued after the bar to marriage (whatever it may be) is known to be removed, habit and reputation may have their proper operation upon the continuing cohabitation, which is not to be referred to the original intercourse." (Page 694.) The conflicting position taken in the principal case would seem to be based upon the supposed necessity that the evidence should not only inferentially establish the fact of marriage, but also the specific moment of time at which the parties contracted to be husband and wife. But in *Campbell v. Campbell*, which was a well considered case, a wholly different view seems to have been taken. Said Lord WESTBURY: "There is no foundation for the argument that the matrimonial consent must of necessity be referred to the commencement of the cohabitation, nor any warrant for the appellant's ingenious argument that, as the consent interchanged must be referred to some particular period, which he insisted was at the commencement of the cohabitation, and therefore insufficient, the cohabitation, which continued afterwards without interruption, would warrant no other conclusion than that which would be warranted by the consent interchanged at a time when it was insufficient. I should undoubtedly oppose to that another, and, I think, a sounder rule and principle of law, namely, that you must infer the consent

to have been given at the first moment when you find the parties able to enter into the contract."

It, nevertheless, frequently happens, when there was no impediment to the marriage, and the cohabitation was at first voluntarily illicit, that the time of the change in the character of the relation can only be approximately determined. Said the auditor in *Physick's Estate*, 4 Am. Law Reg. N. S. 418; "The exact date of a marriage proved by testimony of this nature cannot be accurately decided." See also *Canjolle v. Ferrie*, 23 N. Y. 90; s. c. 26 Barb. 177; *Ferrie v. The Public Administrator*, 3 Bradf. (N. Y.) 151. If, however, there is no general reputation of marriage, and the cohabitation was illicit in its origin, it is clear that the allegation that the marriage took place at a specific time, and at a certain place, must be clearly proved, in order to defeat the *prima facie* presumption that the continued cohabitation was not matrimonial: *Cargile v. Wood*, 63 Mo. 501; *Barnum v. Barnum*, 42 Md. 251. It has also been held that the inference in favor of marriage could not be drawn from cohabitation and reputation, where it was alleged that the marriage took place at a definite time and in a certain manner: *Blackburn v. Crawfords*, 3 Wall. 175-194; *Redgrave v. Redgrave*, 38 Md. 93; *Cram v. Burnham*, 5 Me. 214. This doctrine however seems to have been questioned. (See dissenting opinion of CLIFFORD, J., in 3 Wall. 195; Bingham on Descents 458; and a contrary view is expressed in *Campbell v. Campbell*, and *De Thoren v. Attorney-General*. In *Campbell v. Campbell* the wife was married, in the presence of a minister, during the lifetime of her first husband, to a man with whom she thereafter continuously cohabited both before and after her husband's death. Under these circumstances Lord CRANWORTH said: "Assuming such a ceremony to have

been gone through, the question still remains behind, whether its existence is sufficient to rebut what would, I think, have been, if it had not existed, the irresistible presumption of marriage afforded by the rest of the evidence. I think not. This bigamous marriage ceremony did not prevent the parties to it from afterwards becoming husband and wife, if they were minded so to do." (P. 205.) "In such circumstances," he continued, "we ought to infer, after their deaths, that at some time during the long period during which they lived together, and in some manner, however informal, they did that which they could do without any difficulty, viz., enter into an agreement to be or become married persons, and so to acquire for themselves and their children the status which the evidence satisfies me they wished to enjoy." (P. 206.)

It would therefore seem to be well established as a general proposition, that marriage may be inferred from continuous cohabitation and uninterrupted repute, despite the conflicting presumption that springs from the meretricious inception of the sexual relations: *Wilkinson v. Payne*, 4 Durnf. & East 468; *Fenton v. Reed*, 4 Johns. 52; *Jackson v. Claw*, 18 Id. 346; *Rose v. Clark*, 8 Paige 474; *Physick's Estate*, 4 Am. Law Reg. N. S. 418; *Hyde v. Hyde*, 3 Brad. (N. Y.) 509; *Donnelly v. Donnelly*, 8 B. Mon. 113-7; *Dickerson v. Brown*, 49 Miss. 357; *Floyd v. Calvert*, 53 Miss. 37-46; *State v. Worthingham*, 23 Minn. 528; *Blanchard v. Lambert*, 43 Iowa 228; *Holabird v. Ins. Co.*, 12 Am. Law Reg. N. S. 567; s. c. 2 Dill. C. C. 167; *Jones v. Jones*, 45 Md. 155; *North v. North*, 1 Barb. Ch. 241-3. It was said indeed in *Physick's Estate*, that "in the event of such countervailing presumptions, that in favor of innocence must prevail." Although this presumption can only be overthrown

by "strong and cogent evidence to the contrary:" *DeThoren v. Attorney-General*, *supra*, p. 690; yet it may be questioned whether it will necessarily prevail in every instance over the conflicting inference that the original status of the parties remained unchanged. It is not clear that any greater technical force is to be given to this presumption than is warranted by the evidence from which it is derived: *O'Gara v. Eisenlohr*, 38 N. Y. 296-304. It was therefore said by Lord CRANWORTH, that "where a man and woman have lived together as husband and wife, at a time when they could not be husband and wife, and where they continued to live together in the same manner after it has become possible for them to become husband and wife, the question whether they have become husband and wife, is a question not of law but of fact. The law permits them to create that relation between themselves, and whether they have done so, must be decided like any other question of fact. The circumstance that they represented themselves to be man and wife, when they knew they were not so, may reasonably be taken into account in estimating their subsequent conduct. It may neutralize the effect which would otherwise have been properly given to their subsequent cohabitation, that is, it may do so as matter of fact; I cannot think that it must do so as matter of law; and if that be so, then all which any tribunal can do which has to deal with such a question is, to look to all the circumstances of the case, and consider whether they do or do not lead to the conclusion that the parties did contract marriage at some time after it was possible for them to marry:" *Campbell v. Campbell*, *supra*, p. 201.

The rule thus laid down was illustrated by the recent case of the *State v. Worthingham*, 23 Minn. 528. That was a proceeding in bastardy, in which the defendant pleaded that the woman was

his wife. When the parties first cohabited, the man was married to another woman, but he subsequently obtained a divorce, and continued to reside with the mother of the alleged bastard until these proceedings were instituted. Under these circumstances, the supreme court held that the trial court erred in refusing to permit the defendant to prove by his alleged wife, "that during all the time she lived and cohabited with the defendant, and at the time the child was begotten, as charged in the complaint, she held herself out to her friends, neighbors and the world generally, as the wife of the defendant; that the parties went to St. Paul and remained one night, and returned to Minneapolis, and then represented to the world that they had been married; that the complaining witness thereafter assumed and went by the name of Worthingham. (P. 531.) "The point is presented by counsel for the state," said the court, "that no presumption of marriage can arise in this case from any cohabitation of the parties occurring after the defendant's divorce, because of its illicit character in the beginning. An intercourse originally unlawful and lustful from choice, undoubtedly raises the presumption that its character remains such during its continuance. But this is a presumption, not of law but of fact, for the consideration of the jury in connection with the particular facts and circumstances of the case. In the case at bar, it appears that the cohabitation between the parties had its origin, in part at least, in a desire for marriage, and under a promise that such a relation should be assumed as soon as defendant could procure a divorce from his then wife. This indicates that the parties regarded the married state as one preferable to that of concubinage, and weakens somewhat the force of the presumption ordinarily attaching to an original illicit cohabitation. The weight which is to

be given to it, however, in this as in every other case, rests exclusively with the jury in the exercise of its best judgment, under proper instructions from the court." (P. 536-7.) Such proper instructions combining the two elements which were severally wanting in the above and the principal case, was found in the words of TREAT, J., in his charge to the jury, in the case of *Holabird v. Atlantic Ins. Co.*, 12 Am. Law Reg. N. S. 566, where he said: "The attention of the jury is directed to the difference between a mere attempted recognition of a past void marriage and a subsequent expression of mutual and then present consent to be husband and wife. The subsequent marriage may be proved by habit and repute, if the evidence thereof satisfies the jury that the parties had mutually agreed to become husband and wife in good faith and cohabited thereafter as such." (P. 568.)

See also, *Rex v. Twining*, 2 B. & Ald. 386; *Rex v. Harbone*, 2 Ad. & El. 540; *Lapsley v. Grierson*, 1 H. L. Cas. 498; *Greenboro' v. Underhill*, 12 Vt. 604; *Spears v. Burton*, 31 Miss. 547-54; *Wilkie v. Collins*, 48 Id. 496-511; *Yates v. Houston*, 3 Tex. 433; Best on Presump., 22 Law Lib. 4th series, p. *61; 1 Bish. on Mar. & Div., § 456, where the presumption in favor of the innocence of a conjugal union was brought in conflict with the ordinary presumption of the continuance of the life of a former wife or husband. Thus, in the syllabus to *Lapsley v. Grierson*, *supra*, it is stated that, "there is no absolute presumption of law as to the continuance of life, nor any absolute presumption against a party doing an act because the doing of it would make him guilty of an offence against the law. In every instance the circumstances of the case must be considered." And in *Rex v. Harbone*, DENMAN, C. J., says, "that nothing can be more absurd than the notion, that there is to be any rigid presumption of law on such a question

of fact, without reference to accompanying circumstances, such for instance, as the age or health of the party." It would therefore seem, that when the circumstantial evidence in support of marriage becomes confused by conflicting inferences, that it rests wholly with the jury, unbiassed by any binding in-

struction from the court to weigh against each other the fundamental facts from which the countervailing presumptions are deduced, and to strike that balance which best accords with the special circumstances of each individual case. J. P. B.

Supreme Court of Tennessee.

JACOB RENEGAR v. THOMAS C. THOMPSON.

If a creditor take a mortgage from the principal debtor on sufficient property to secure his debt, and afterwards enter into a different agreement with such debtor and abandon the mortgage, such acts will discharge the surety, who may make the defence in a court of law and will not be compelled to resort to a bill in equity.

ON the 18th April 1873, James Mathews, with James Tatum and Jacob Renegar as his sureties, executed his note to Thompson for \$300, due 25th December thereafter. On 25th November 1875, suit was brought. The defences of the security, Renegar, were, First: That he had given to Thompson verbal notice to collect the note, &c.; second: that Thompson had taken a mortgage from Mathews on a saw-mill, of the value of \$2000 or \$2500, to secure said debt, and afterwards abandoned the mortgage and made another and different arrangement with the principal, Mathews, without the knowledge or consent of Renegar. These facts were proven on the trial.

The opinion of the court was delivered by

TURNER, J.—The verbal notice to sue was not a defence at law, as the statute requires such notice to be given in writing and proven by two witnesses. The circuit judge ruled that the taking of the mortgage and its abandonment for "another and different arrangement," as the plaintiff was shown to have admitted, was no defence to the action. This was error; the rule is, a creditor must, in all transactions with the principal debtor, act with the most perfect good faith toward sureties, for if he does any act injurious to them or inconsistent with their rights, or omit to do any act, which his duty to them requires, whereby they are injured, they will be discharged from responsibility: *Bond v. Ray*, 5 Humph. 492.

We know of no case in our state in which this question has arisen at law. In the case of *King v. Baldwin*, 17 Johns. 384, Chief Justice SPENCER said: "The principle adopted by this court

in *Rathbone v. Warren*, that a surety will be discharged if a new agreement be entered into between the creditor and the principal debtor, varying or enlarging the time of performance of a contract, although amply supported by cases decided in the English courts, is of modern growth even in a court of equity, and it is well settled now that this defence may be set up in equity." I do not, then, perceive any solid objection to a court of law taking cognisance of the matter forming the grounds of the appellant's relief, because in such cases courts of equity have also jurisdiction. Much less do I perceive the necessity of applying to a court of equity to compel a creditor to do what equity and good conscience require of him."

If this duty exists and does bind the conscience of the creditor, I cannot conceive why it may not be brought into exercise by an act *in pais*, and without the intervention of a court of equity. This reasoning applies in all its force to the case in hand.

If the acts and conduct of the creditor are of a sort to discharge a surety, we know of no substantial reason why the surety may not avail of them by proper pleas, to an action at law; why may he not defend in the forum selected by the creditor, rather than be compelled to resort to the jurisdictional powers of a court of equity and then make a successful defence upon precisely the same facts that would be elicited under proper pleadings at law? If such was ever the rule, it was highly technical and without the support of reason, and should give way to the constant progress of improvement in our system of jurisprudence.

The matters of defence offered here, are plain and simple facts, without the least complication, of easy comprehension by a jury, and present no reasonable ground for exclusive equity jurisdiction unless it be a pure technicality.

The facts claimed to effect the discharge of the surety are as easy and intelligible as would be those under pleas of payment, set-off, accord and satisfaction, arbitrament and award, or any of the other pleas commonly pleaded in a court of law, and we can conceive of no reason for distinguishing between the case at law and the cases instanced. The abandonment of the mortgage in consideration of another arrangement with the principal debtor, was bad faith to the security whereby he was injured.¹

Judgment reversed.

¹ See *Gillespie v. Darwin*, 6 Heisk. 21, and *Lindsay v. Champion*, 1 Baxter 466, to the same effect.

RECENT ENGLISH DECISIONS.

High Court of Justice. Chancery Division.

WHEELDON v. BURROWS.

There will be no implied reservation of an easement, though it be a continuous and apparent easement, unless it be also an easement of necessity.

A vendor having conveyed a plot of land, part of his property, to A., without any reservation and subsequently another plot, part of the property retained and adjoining the first plot, to B. ; upon B. claiming in right of his plot a right of light over A.'s plot, which, in the opinion of the court, was not an easement of necessity; *Held*, that though the easement claimed might be continuous and apparent, yet, not being one of necessity, there was no implied reservation of it by the vendor out of his conveyance to A., and B. was therefore not entitled to it.

THIS was an action whereby the plaintiff sought to restrain the defendant from pulling down a boarding, which the plaintiff had erected upon his own land, for the purpose of preventing the defendant acquiring by prescription a right to light through the windows of a wall belonging to the defendant, and which separated the land of the defendant from that of the plaintiff. There was no dispute as to the facts, and the plaintiff waived any claim for damages by reason of the defendant's trespass. The only question therefore remaining, was the question of law whether the defendant had or had not a right of light through the above-mentioned windows over the plaintiff's land.

The facts will be found fully stated in the judgment of the Vice-Chancellor, who delivered a written judgment.

Horton Smith, Q. C., and *Romer*, for the plaintiff.—The vendor conveyed our piece of land to us without any reservation of easements before the conveyance to the defendant, and therefore, on the rule of law that a grantor cannot derogate from his own grant, no right of light for the land of the vendor retained by him and the shed built upon it was reserved. The fact that such an easement as the right of light claimed in this case is an apparent and continuous easement, does not cause an implied reservation of such easement, except where the easement is one of necessity, which the evidence shows this is not. *Russell v. Harford*, Law Rep. 2 Eq. 507; *Gale on Easements*, 4th ed., c. 4; *Suffield v. Brown*, 4 DeG., J. & S. 185; *Pyer v. Carter*, 1 H. & N. 922; *Tenant v. Goldwin*, 2 Ld. Raym. 1093, 1 Salk. 360; *Palmer v. Fletcher*, 1 Lev. 122; *White v. Bass*, 7 H. & N. 722; *Curriers' Co. v.*

Corbett, 2 Dr. & Sm. 355, 4 DeG., J. & S. 764, 771; *Ellis v. Manchester Carriage Co.*, Law Rep. 2 C. P. D. 13; *Crossley v. Lightowler*, Law Rep. 3 Eq. 279, 283, Law Rep. 2 Ch. 478; *Watts v. Kelson*, Law Rep. 6 Ch. 166; *Dodd v. Burchell*, 1 H. & C. 113; *Pearson v. Spencer*, 3 B. & S. 762; *Morland v. Cook*, Law Rep. 6 Eq. 265.

Sir *H. M. Jackson*, Q. C., and *F. H. Colt*, for the defendant.—The defendant is entitled to a right of light in respect of his shed, for though there was no express reservation of easements by the vendor out of his conveyance to the plaintiff, this right of light is an easement apparent and continuous, and is thus impliedly reserved without express reservation. *Pyer v. Carter*; *Wardle v. Brocklehurst*, 1 E. & E. 1058; Gale on Easements, 4th ed., c. 4; *Nicholas v. Chamberlain*, Cro. Jac. 121; *Pinnington v. Galland*, 9 Ex. 1; *Richards v. Rose*, 9 Id. 215; *Kay v. Oxley*, Law Rep. 10 Q. B. 360; Goddard on Easements 138; *Swansborough v. Coventry*, 9 Bing. 305; *Compton v. Richards*, 1 Price 27; *Ewart v. Cochrane*, 4 Macq. 117; *Dodd v. Burchell*, 1 H. & C. 113; *Davies v. Sear*, Law Rep. 7 Eq. 427; *Hinchliffe v. Kinnoul*, 5 Bing. N. C. 25; Dart's Vendor and Purchaser, 5th ed., p. 537.

Horton Smith, Q. C., in reply.

BACON, V. C.—This action is brought by the plaintiff for the purpose of restraining the defendant from repeating a trespass committed by him upon the plaintiff's land, the defendant insisting that the alleged trespass had been merely the exercise of the right possessed by him, to prevent the erection on the plaintiff's land of any obstruction to the use of light through certain windows in a tenement, belonging to the defendant and adjacent to and overlooking the plaintiff's land. [His lordship, after adverting to the facts as regards the trespass, which he said was admittedly trivial, and merely for the purpose of trying the right, continued:] The question to be decided is therefore one of law only.

In 1856, one Allen became the absolute owner of a piece of land in Derby, of which the portion now belonging to the plaintiff and lying towards the north, was divided from the rest by a dry brick wall. In 1858, Allen built upon the southern part of his land, close to this wall, a shed or workshop, which was lighted only by skylights. In 1861, Allen altered this shed, rebuilt and raised

the wall belonging to it and also raised the roof, abolished the skylights, and inserted four windows in the wall which he had so raised. Of these windows, one was afterwards covered by a workshop, built by Allen on that part of the land which has become the plaintiff's, but there remained and still remain in the wall of the shed built by Allen three windows, the subject of the present action. Allen continued to use and occupy the whole of the premises until 1867, when they were sold by him to one Woolley. In 1871, Woolley conveyed the premises to Tetley, who, in 1875, caused them to be advertised for sale by public auction. The plaintiff's immediate predecessor became the purchaser at the auction of lot 10, described in the printed particulars of sale as, "All that valuable piece of eligible building land, containing, &c., and having a frontage and depth, &c., together with the building thereon, now used and occupied by Mr. Wm. Wheeldon (the plaintiff's predecessor in title), as a millwright's shop. This lot is suitable for the erection of a factory or mill." By a deed dated the 6th of January 1876, Tetley conveyed the land to Wm. Wheeldon in fee, by the description of "All that piece or parcel of land or ground containing by admeasurement 600 feet," &c., "together with the buildings erected on a part of the said piece of land and now used or occupied as a millwright's shop, and which piece of land and hereditaments are bounded towards the east, &c., towards the west, &c., towards the north, &c., and on or towards the south, by other hereditaments remaining the property of the said Samuel Tetley, and which are now in the tenure or occupation of the said Wm. Wheeldon." Then came the usual general words, "Together with all walls, fences, lights, watercourses," and so on. The premises, now the property of the defendant, were thus described in the same particulars of sale as, "All that valuable silk-mill, situate on Monk street, consisting of a three-story mill, winding-room and other rooms, and high pressure steam-engine, and an elastic web manufactory situate in the rear, the whole forming one of the most complete establishments in Derby; the mill and gimp-shed are at present let. The whole machinery on this lot will be sold with the freehold, particulars of which will be furnished." This lot was bought in at the auction, and was afterwards purchased by private contract by the defendant, to whom it was conveyed by Tetley, by a conveyance dated the 7th of April 1871, by the description of "All that silk-mill and factory," and so on, and the boundaries,

"on other part by a piece of land and hereditaments lately sold and conveyed by the said Samuel Tetley to one Wm. Wheeldon, and on the south," by other premises, and so one; that clause contains the usual general words, among which are, "together with all houses, out-houses, gardens, passages, lights, waters, water-courses, privileges, emoluments and appurtenances whatsoever."

In January 1878, the plaintiff erected boardings near to the edge of her land, and facing the three windows of the defendant's shed, for the purpose of ascertaining her right to the uncontrolled use and possession of the whole of her land. Immediately thereupon, the defendant knocked down those boardings by means of crowbars or poles inserted through the windows of his wall. These facts are all clearly proved or admitted.

Numerous authorities have been referred to on both sides, but the principles of law insisted upon by the plaintiff are, that the defendant's vendor, not being entitled to any prescriptive right to the lights in question, and no mention having been made of them in the conveyance to the plaintiff's predecessor in title, an absolute, unqualified, unrestricted right to the land passes by the conveyance to him; and that to hold the contrary would be repugnant to the well-established principle of law, that a grantor cannot derogate from his grant. The defendant, on the other hand, asserts and insists that the three windows in question constituted a continuous easement, and that it was open and notorious, and that although no mention is made of it by way of reservation or otherwise in the conveyance through which the plaintiff claims, it must in point of law be held that a reservation of the vendor's rights to it must be implied, and that such implication is as extensive and effectual as if the reservation had been in terms and unequivocally expressed in the conveyance under which the plaintiff claims. [His lordship then remarked upon the number of cases cited and the differences between them, and continued:] It is enough if a conclusive and clear principle of law is deducible from them, and must be recognised in every case to which it is applicable. [His lordship then referred to *White v. Bass*, and part of the judgment of Mr. Baron MARTIN therein, as follows: "The plaintiff's counsel contends that notwithstanding the grant of the land in the most general terms, the purchasers are restricted in their use of it, so that they cannot make any erection upon it, which obstructs the light and air of the

plaintiff's house; I know of no authority for that position," and continued:] In *Suffield v. Brown*, Lord WESTBURY in his judgment says: "The effect of this (that was the judgment appealed from) is, that if I purchase from the owner of two adjoining freehold tenements, the fee-simple of one of them, and have it conveyed to me in the most ample and unqualified form, I am bound to take notice of the manner in which the adjoining tenement is used or enjoyed by my vendor, and to permit all such constant or occasional invasions of the property conveyed as may be requisite for the enjoyment of the remaining tenement in as full and ample a manner as it was used and enjoyed by the vendor at the time of such sale and conveyance. This is a very serious and alarming doctrine; and I believe it to be of very recent introduction, and it is, in my judgment, unsupported by any reason or principle when applied to grants for valuable consideration." Then Lord WESTBURY's attention seems to have been drawn to the passages to which I have been referred in *Gale on Easements*, and he says: "I cannot agree that a grantor can derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements, enjoyed by an adjoining tenement, which remains the property of him, the grantor." In the course of his judgment, Lord WESTBURY expressed his dissent from the judgment of the Court of Exchequer in *Pyer v. Carter*; and the Lords Justices having, in a subsequent case of *Watts v. Kelson*, expressed a contrary opinion, being satisfied with the decision in *Pyer v. Carter*, it has been suggested that some doubt is thrown upon Lord WESTBURY's judgment in *Suffield v. Brown*; but I think there is no ground for such a suggestion, for whether *Pyer v. Carter* was rightly decided or not does not affect Lord WESTBURY's decision in the case before him. I am not under the necessity of expressing any opinion on the subject; but Lord CHELMSFORD, in *Crosseley v. Lightowler* speaking of Lord WESTBURY's view of *Pyer v. Carter*, said, "I entirely agree with this view," and further, "It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for *non constat* that the grantor does not intend to relinquish it, unless he shows the contrary by expressly reserving it. The argument of the defendants would make in every case of this kind, an implied reservation by law, and yet the law will

not reserve anything out of a grant in favor of a grantor except in case of necessity."

That seems clearly to be the law, though Lord CHELMSFORD in that case, says, if carried to excess it would produce great and startling injustice. [His lordship then referred to *Ellis v. Manchester Carriage Co.*, which followed the cases he had previously referred to, and continued:] Now, this being the state of the law, the defendants have relied upon the case of *Pyer v. Carter*, and several other cases, as showing that with respect to continuous easements, the absence of any mention in the conveyance of any reservation is not inconsistent with a reservation by implication; but all the cases in which a reservation has been implied, are cases in which the necessity of the case required such an implication. Why? Because the thing sold and conveyed could not be enjoyed by the grantee in the manner and to the extent which it was plainly by both parties intended that it should be, unless such implication were made. I take it that the rule of implication is founded upon the mere necessity of the case and the impossibility of admitting that the contract, and the intention of the parties to it would be complete without the implication. The subject of the implication is held to have been involved in the terms of the contract, and the justice and honesty of the transaction require that the law should supply that, which by the inadvertence of the parties, has not been expressed in words. Upon this principle every one of the cases referred to is founded and all are reconcilable, and no case has been cited, nor do I believe that any can be found in which an implication has been made not based upon necessity and the justice that necessity imperatively calls into active operation. It cannot, I think, be said that any such necessity exists in the present case as renders it expedient or proper that the vendor of lot 6 should reserve to himself any right in lot 10 which would exclude or restrict the grantee of lot 6 from using and enjoying it without qualification or restriction. It was not necessary that the windows in the shed should exist; it is not suggested that there is any particular manufacture carried on in the shed, or that any peculiar position of windows or condition of the light are requisite for the full enjoyment by the vendor of that portion of his property, which he retained after he conveyed the land to the plaintiff without reservation. Windows might have been inserted by the

vendor on the other side of his shed, or he might have reverted to his former contrivance of lighting it by skylights.

The plaintiff is therefore entitled to his injunction.

How generally the American courts deny the acquisition of a right to light and air by prescription, as allowed in England, was shown in the note to *Stein v. Hauck*, 17 Am. Law Reg. 440, but on the point involved in *Wheeldon v. Burroughs*, they are much divided. Four different views seem to prevail. The first is that upon the severance of a tenement, a right to light and air is generally implied in favor of the grantee over the remaining land of the grantor, and apparently without reference to the question of its actual necessity for the full enjoyment of the estate granted. The second is that such right is implied only when it is actually necessary, and not where it is only convenient, though highly so, to the purchaser. Third, that such right is never implied, however necessary to the enjoyment of the estate purchased. Fourth, that such right is never impliedly reserved in favor of a grantor, as against an absolute and unconditional grantee, free from encumbrances, even if under similar circumstances it might be implied in favor of a grantee against his grantor.

1. The right is implied whether necessary to the estate or not.

The earliest reported case on this point is *Story v. Odin*, 12 Mass. 157, which, though subsequently shaken if not overruled in its own state, has yet been so often approved and followed elsewhere, that an impartial consideration of the authorities seems to require its citation as a leading case on this side of the question.

In that case Story bought, in 1795, a lot of land of the town of Boston situated in Dock square, with a store upon it, having a door and two or three windows looking out over the adjacent vacant lot also owned by the town, and

which the town subsequently, in 1812, sold to Odin, who erected a building upon it, covering the whole ground, and adjoining the back wall of the store, and thus obstructed the light and air thereto. The deed to S. was with all the privileges and appurtenances, and without any exception or reservation of a right to build on the adjoining lot, or to stop the lights in the store so sold. It was held to be "clear that the grantors themselves could not afterwards lawfully stop those lights, and thus defeat or impair their own grant; and as they could not do this themselves, so neither could they convey a right to do it to a stranger." And a verdict for S. was sustained.

This case has not only been often cited with apparent approbation in the same state (see 17 Mass. 448), but also by such distinguished judges elsewhere, as STORY, SELDEN and others. See 1 Sumn. 503; 21 N. Y. 513.

Next after *Story v. Odin*, and much relying upon it, came *Robeson v. Pit-tenger*, 1 Green's Ch. Rep. 57, in the Court of Chancery of New Jersey, in 1838. There S. owning two lots, built a dwelling-house on one "immediately on the line of" the other, with six windows, which opened and received light and air from the other. The house came into the possession of the plaintiff, and the other lot into that of the defendant, who purposed to erect a building thereon which would darken the plaintiff's windows. The plaintiff obtained an injunction against the same, partly upon the ground that the windows had existed for more than twenty years, and partly because "the adjoining lot was owned by the man who built the house and subsequently sold it to the plaintiff."

But the most direct, and apparently the best considered recent American authority upon this side of the question is that of *Janes v. Jenkins*, 34 Md. 1 (1870). In this case A., the owner of two adjoining lots, called the east and west lots, leased the east lot for ninety-nine years, with a covenant that the lessee might make openings, and place lights in the wall which he contemplated erecting on the west line of said lot. The wall was erected and lights placed in it overlooking the west lot, which A. subsequently conveyed to B. Subsequently to the erection of the wall, and the last deed to B., A. sold the east lot to C., by a deed containing this clause: with, "all and every the rights, alleys, ways, waters, privileges, appurtenances and advantages to the same belonging, or in any wise appertaining." The deed of the west lot to B. contained a special covenant of warranty, and in an action thereon for an alleged breach by reason of the existence of the wall on the east lot, overlooking the other, whereby the grantee was prevented from building on the same, it was clearly held that the owner of the east lot had acquired by his grant a right to maintain the wall and windows, and overlook the other lot, and the case of *Story v. Odin*, was cited and approved. Perhaps the peculiar phraseology of the grant in this case may have aided in arriving at the conclusion, but the court seems to fully adopt the broad English doctrine.

The English rule seems also to prevail in Louisiana: *Dazel v. Boisblanc*, 1 La. Ann. 407 (1846); but this may be expressly secured by the civil code, there prevailing. See especially Articles 707, 711, 712, 713.

2. The second view is that such implied grant exists, where the existing light and air is substantially *necessary* for the enjoyment of the house or building conveyed, but not where it is only *convenient*.

On this subject Judge WASHBURN,

after a review of several authorities, says (Wash. on Easements, c. iv., sect. 6, p. 618): "So far as weight of authority, both English and American, goes, it would seem that if one sell a house, the light *necessary* for the reasonable enjoyment whereof is derived from and across adjoining land, then belonging to the same owner, the easement of light and air over such vacant lot would pass as incident to the dwelling-house, *because necessary to the enjoyment thereof*; but that the law would not carry the doctrine to the securing of such easement, as a mere convenience to the granted premises."

It may be that the above is a just and reasonable rule to prevail, but it is not easy to see that it is positively determined by the authorities referred to by the learned author. It has, however, some supposed analogies to support it, and it has recently been cited and approved in several cases. It was quoted with approbation in *Turner v. Thompson*, 58 Ga. 268 (1877), although that state denies the doctrine of any *prescriptive* right to light and air; 49 Ga. 19.

So, in *Powell v. Sims*, 5 West Va. 1 (1871), it was held that an implied grant of an easement of lights will be sustained only in cases of real and obvious necessity; and will be rejected when the person claiming the same can, at a reasonable cost, substitute other lights to his building; each case being determined on its own facts as to the *degree* of necessity requisite for a foundation of the rights.

In like manner in *White v. Bradley*, 66 Me. 263 (1876), it seems to be impliedly admitted that there may be cases falling under Judge WASHBURN'S rule of necessity, though that particular case was decided against the right, on the ground that it was a "mere convenience" to the granted premises.

3. The right is *never* implied. There is certainly some room for argument that if light is absolutely necessary

to enjoy the estate granted, a right to its free passage might be implied, in the same manner as a right of way arises where no other means of access exist to the estate conveyed; but the current of modern authorities seems to set against applying the analogy to light and air; especially in those states which repudiate the English doctrine of a prescriptive right of light.

One of the most striking illustrations of this view may be found in the recent elaborately considered case of *Keats v. Hugo*, 115 Mass. 204 (1874). The defendant had sold the plaintiff a dwelling-house, by a warranty-deed, with all the "privileges and appurtenances." The house stood on the line *adjoining* other vacant land of the defendant, with a door and windows in that side. After the conveyance the defendant erected a structure and woodshed on his vacant lot against the dwelling-house, and *within about eight inches of the same*. The plaintiff brought an action for obstructing his right to light and air, and the question of an implied grant was the only point involved in the case. Two other cases involving similar questions between other parties were also argued by eminent counsel, and the whole were carefully considered together, and the same result reached in each by the whole court. Chief Justice GRAY, in an elaborate review of the authorities, establishes, first, that in that state no right of light and air could be obtained by prescription; and second, that the same considerations lead to the position that the doctrine of implied grant (which is there recognised in some other easements), does not apply to this claim. "By nature," he says, "light and air do not flow in definite channels, but are universally diffused. The supposed necessity for their passage in a particular line or direction to any lot of land, is created not by the relative situation of that lot to the surrounding lands, but by the manner in

which that lot has been built upon. The actual enjoyment of the air and light by the owner of the house is upon his own land only. He makes no tangible or visible use of the adjoining lands, nor indeed any use of them, which can be made the subject of an action by their owner, or which in any way interferes with the latter's enjoyment of the light and air upon his own lands, or with any use of those lands in their existing condition. In short, the owner of the adjoining lands has submitted to nothing which actually encroached upon his rights, and cannot, therefore, be presumed to have assented to any such encroachment. The use and enjoyment of the adjoining land are certainly no more subordinate to those of the house where both are owned by one man, than where the owners are different. The reasons upon which it has been held that no grant of a right to air and light can be implied from any length of continuous enjoyment, are equally strong against implying a grant of such a right from the mere conveyance of a house with windows overlooking the house of the grantor. To imply the grant of such a right in either case, without express words, would greatly embarrass the improvement of estates, and by reason of the very indefinite character of the right asserted, promote litigation. The simplest rule, and that best suited to a country like ours, in which changes are continually taking place in the ownership and the use of lands, is that no right of this character can be acquired without express grant of an interest in or covenant relating to, the lands over which the right is claimed."

Story v. Odin was criticised and distinguished but was not expressly declared to be overruled, as apparently it might safely have been.

The courts of New York also deny the doctrine of an implied grant, especially between lessor and lessee; and they

allow a landlord who owns land adjoining the demised premises to build upon it, even though thereby he seriously darkens the light in the buildings leased. *Palmer v. Wetmore*, 2 Sandt. 316 (1849); *Myers v. Gemmel*, 10 Barb. 537 (1851); and Ohio is to the same effect; *Mullen v. Stricker*, 19 Ohio St. 135 (1869); even if the use of the windows be actually necessary for the estate granted; and Pennsylvania inclines the same way: *Maynard v. Esker*, 17 Penn. St. 222 (1851); 33 Id. 371. Indiana, in *Keifer v. Klein*, 51 Ind. 316 (1875), in an elaborate opinion, adopted the same rule.

4. Even if the doctrine of an implied grant be applied in favor of a *grantee* there is much less reason to apply it in favor of the *grantor*, and it may be safely asserted that nowhere, in England or America, can a grantor who has sold a vacant lot without restriction or reservation, having his dwelling-house adjoining, retain any implied right to prevent his grantee from erecting any building or structure on the land granted, even though it should interfere with lights and windows of his own house. The contrary rule would clearly derogate from his grant, since he conveys a fee unrestricted, and *cujus est solum ejus est ad cælum*.

This was the point really involved in the elaborate and well-considered case of *Morrison v. Marquardt*, 7 Am. Law Reg. N. S. 336; 24 Iowa 35 (1867), although the court inclined to apply the same rule conversely, certainly unless it be clear from the deed that the parties intended differently.

And this is undoubtedly the English law; the grantee in the case of an absolute conveyance has a right to use the land in any lawful way, for if the grantor fear an injury to his lights and

air, he should make a restriction in the deed of conveyance: *Tenant v. Goodwin*, 2 Ld. Raym. 1893, Ld. Holt; *White v. Bass*, 7 H. & N. 722 (1862), *Curriers' Co. v. Corbett*, 2 Dr. & Sm. 355 (1865).

This point was more fully considered in the late case of *Ellis v. The Manchester Carriage Co.*, 2 C. P. Div. 13 (1876). There the plaintiff, in 1867, bought nine houses in Manchester, the rear of which abutted on a street or way, on the opposite side of which were certain cottages. In 1868, he bought the cottages also, but by a different title. Both estates had existed in their then condition for over twenty years. In 1870 the plaintiff sold the cottages to D., without any reservation, who afterwards conveyed to the defendants; they pulled down the cottages and erected a large building upon the site, and also upon a portion of the intervening street or way, and so obstructed the plaintiff's windows. It was held, that although the plaintiff's houses had acquired an "absolute and indefeasible," right to light, under stat. 2 & 3 Wm. 4, c. 71, s. 3, the defendants were not guilty of any wrongful obstruction of the plaintiff's lights, since his own deed to D. was without any reservation. And see *Warner v. McBride*, 36 Law T. 360 (1877).

Hence it will be seen that although in cases of some easements, such as a right of way, an implied reservation exists in favor of the grantor over or upon the land granted, especially when reasonably necessary for the use of the estate retained; this doctrine is not applied to an easement of light and air even by those courts which, as in England, most firmly support such right in favor of a grantee against his grantor, under like circumstances.

EDMUND H. BENNETT.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹SUPREME COURT OF RHODE ISLAND.²SUPREME COURT OF APPEALS OF WEST VIRGINIA.³SUPREME COURT OF WISCONSIN.⁴

ADMIRALTY.

Vessel overtaking another—Rule 22.—Rule 22 of § 4233 of the Revised Statutes of the United States, which directs that "every vessel overtaking any other vessel shall keep out of the way of the last-mentioned vessel," applies until the overtaking vessel has completely passed the other: *Kennedy v. American Steamboat Co.*, 12 R. I.

AGENT.

Setting up Illegality of Contract—Estoppel.—If A. obtains money from B. as for the purpose of paying it for B. to X., upon their agreement with X., and does not so pay it, but converts it to his own use, he cannot retain it as against B., on the ground that the contract with X. was illegal: *Kiewert v. Rindskopf*, 46 Wis.

CONSTITUTIONAL LAW.

Statute may be partly Void and partly Valid.—Gen. Stat. R. I. cap. 79, prohibiting the sale and keeping for sale of intoxicating liquors, contains no exception in favor of importers whose imported liquors remain in the original packages, or of dealers holding outstanding licences: *Held*, that the chapter, although void as to such importers, was valid as to other persons, and if void as to license holders was valid as to others: *State v. Amery*, 12 R. I.

A law which is constitutional within certain limitations may, if it exceeds those limitations, be valid within them and void only for the excess: *Id.*

CONTRACT. See *Agent*; *Fraud*; *Specific Performance*.

Rescission—Need not be by Express Agreement.—The rescission of a contract does not always require the *express agreement* of both parties; but where the contract is executory on both sides, upon *non-performance* by one party, the other may declare it rescinded. So *held* in the case of a building contract, where the alleged non-performance on plaintiff's part consisted in a failure to make payments as they fell due by its terms during the progress of the building: *School District v. Hayne*, 46 Wis.

CRIMINAL LAW:

Record—Notes of Evidence.—The minutes of the evidence in crim-

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1878. The cases will probably be reported in 8 or 9 Otto.

² From Arnold Green, Esq., Reporter; to appear in 12 R. I. Reports.

³ From Hon. Robert White, Reporter, to appear in 14 W. Va. Reports.

⁴ From Hon. O. M. Conover, Reporter, to appear in 46 Wis. Reports.

inal actions, though required by the statute to be kept by the judge and filed with the clerk, are no part of the record proper, and can be brought to the Supreme Court on a writ of error, only by bill of exceptions; and where the bill of exceptions merely shows that no such minutes were kept nor exceptions taken on the trial noted by the judge, and does not show that his failure in that respect *was excepted to*, it shows no ground for reversal: *Allen v. The State*, 46 Wis.

EJECTMENT. See *Possession*.

ELECTION LAW.

Election Canvassers—Functions are Judicial.—Boards of canvassers sitting to correct voting lists, exercise judicial functions: *Keenan v. Cook*, 12 R. I.

Query, whether they are liable in a civil action, for striking a name from the voting list or for refusing to place a name on it: *Id.*

But if they are so liable: *Held*, that they are to judge of the proof prescribed by Gen. Stat. R. I. chap. 7, § 14, and that in the absence of evidence showing that they struck a name from the voting list without proof of disqualification, which was satisfactory to them, judgment must be given in their favor: *Id.*

In an action against them for refusing to place a name on the voting lists: *Held*, that in the absence of evidence showing that they decided dishonestly or with a wilful purpose to deprive the plaintiff of his rights, although their decision was precipitate and erroneous, judgment must be given in their favor: *Id.*

EQUITY. See *Jurisdiction*; *Specific Performance*.

Practice—Trust.—On a testamentary trustee's bill for instructions: *Held*, that the court would only instruct the trustee in regard to circumstances actually existing or tolerably certain to arise in the course of his trust management: *Goddard v. Brown*, 12 R. I.

Held, further, that the court would not decide whether an interest was vested or contingent in a case where the question could only become important to the trustee by the death of a living *cestui*: *Id.*

Practice—Cross-bill.—Generally a cross-bill, *ex vi terminorum*, implies a bill brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching matters in question in the original bill. It is generally proper when a cross-bill is filed against co-defendants to make the plaintiff in the original suit a defendant in the cross-bill: *West Va. O. & O. L. Co. v. Vinal*, 14 W. Va.

A cross-bill being generally considered as a defence to the original bill, or as a proceeding necessary to a complete determination of a matter already in litigation, the complainant is not, at least as against the complainant in the original bill, obliged to show any ground in equity to support the jurisdiction of the court. It is treated, in short, as a mere auxiliary suit or dependency upon the original; but when a cross-bill seeks not only discovery but relief, care should be taken that the relief prayed by cross-bill should be equitable relief: *Id.*

When the cross-bill not only sets up matters of defence to the original

bill, but prays the specific performance of a parol contract set up as a defence to the original bill in relation to realty, so far as it prays for affirmative relief upon said contract, it may be termed a cross-bill for relief in the nature of an original bill, and it is competent for the court to dismiss the original bill and afterwards treat and proceed with the cross-bill in such case as an original bill for relief: *Id.*

ESTOPPEL. See *Agent*.

EVIDENCE.

Record—Parol Evidence.—An officer's return on an execution is a part of the record of the case in which the execution issued: *Esten v. Cooke*, 12 R. I.

Parol evidence cannot be admitted to contradict the court record. Hence, in an action of debt on a judgment to which the defendant pleaded satisfaction, as appeared from the officer's return, in a larger sum than was admitted in the declaration: a replication, which set forth that part of the satisfaction pleaded arose from an illegal levy, the proceeds of which the plaintiff was compelled to refund, was held bad on demurrer, the record evidence of satisfaction being conclusive until modified by some proper proceeding operating directly on the record: *Id.*

FORMER ADJUDICATION. See *Stream*.

Parol Evidence of what was decided.—The judgment in a former suit between the same parties is conclusive of every issue decided in that suit, and in the second suit, it can be shown by parol evidence what was tried in the first, whenever it becomes necessary to do so: *Campbell v. Rankin*, S. C. U. S., Oct. Term 1878.

FRAUD.

Rescission of Contract for.—In an action to set aside a contract with defendant upon the ground that it was obtained by his false and fraudulent representations, plaintiff cannot recover if defendant believed the representations to be true, and plaintiff had equal opportunity with him of ascertaining their falsity, or had the means of ascertaining it by the exercise of reasonable diligence and was not prevented from doing so by any artifice of the defendant: *Mamlock v. Fairbanks*, 46 Wis.

HIGHWAY. See *Negligence*.

Municipal Corporation—Overflow of Land on Highway—Change of Grade.—No action lies against a municipal corporation for allowing the ordinary and natural flow of surface-water to escape from a highway on to adjacent land. Nor will an action lie for the results of such usual changes of grade as must be presumed to have been contemplated and paid for at the layout of the highway: *Wakefield v. Newell*, 12 R. I.

A municipal corporation has the same powers over its highways in respect to surface-water as an individual has over his land. *Inman v. Tripp*, 11 R. I. 520, explained and affirmed: *Id.*

HUSBAND AND WIFE.

Separate Estate of Wife.—The separate equitable estate of a married woman is subject to an equitable charge for her individual contracts in

favor of her creditors, and if a married woman declares expressly and in writing her intention to charge her separate equitable estate, or if she so declares verbally and her contract is for the benefit of herself or her separate estate, the charge will be valid : *Elliott v. Gower*, 12 R. I.

Wife's Separate Estate—Her Power over it—Restraint on her Power of Alienation must be express—Liability for her Debts.—A married woman, as to the property settled to her separate use, is to be regarded as a *feme sole*, and has a right to dispose of all her separate personal estate, and the rents and profits of her real estate accruing during the coverture, as if she were a *feme sole* unless her power of alienation is restrained by the instrument creating the estate : *Rudford et al. v. Carwile et al.*, 13 W. Va.

Such restraint upon her power of alienation will not be implied from being authorized to dispose of the property in a specified manner. Such restraint must be either expressed, or so clearly indicated as to be equivalent to an express restraint : *Id.*

The liability of the separate estate of a married woman to the payment of all her debts incurred during coverture, is also an incident of the ownership of such separate estate; and it, too, can only be taken away by express words, or by an intent so clear as to be the equivalent of express words : *Id.*

But these incidents, liability to the payment of her debts and her *jus disponendi*, extend no further than to all her separate personal property and the rents and profits of her separate real estate accruing during the continuance of the coverture : *Id.*

The common law effectually protected the *corpus* of her real estate against her husband's control and against his debts. And her common-law disability to make any contract or incur any debt, during her coverture, which will in any manner affect or charge the *corpus* of her real estate, whether such real estate be separate property or not, is still in full force. The *corpus* of her real estate can only be affected or charged, by the vendor's lien when it has been reserved or by a conveyance or specific lien created by deed in which her husband has united with her and which she executed after privy examination : *Id.*

The debts of a married woman, for which her separate estate is liable, are such as arise out of any transaction out of which a debt would have arisen, if she were a *feme sole*, except that her separate estate is not bound by a bond or covenant based on no consideration, such bond or covenant being void at law, and she not being estopped from showing in a court of equity that it was based on no consideration : *Id.*

The consideration which will support an action for her debts or contracts, so as to make her separate estate liable, need not enure to her own benefit, or that of her separate estate, but it may enure to the benefit of her husband or any third party or may be a mere prejudice to the other contracting party; in short, it may be any consideration which would support the contract if she were a *feme sole* : *Id.*

But her separate estate cannot be made liable for the payment of any debt of her husband or of any other person, unless she has agreed to pay the same by some contract in writing, signed by her or by some one authorized by her : *Id.*

JURISDICTION.

Statutory Remedies.—Whenever a new right is granted by statute, or a new remedy for violation of an old right, or whenever such rights and remedies are dependent on state statutes or acts of Congress, the jurisdiction of such cases, as between the law side and the equity side of the federal courts, must be determined by the essential character of the case, and unless it comes within some of the recognised heads of equitable jurisdiction, it must be held to belong to the other: *Van Norden v. Morton*, S. C. U. S. Oct. Term 1878.

JURY.

Objection to Juror—Rights of Jurors not to Criminate themselves.—Though an objection to a juror, as legally disqualified, be improperly overruled, the error is cured if it appear affirmatively that he was not on the jury when the case was tried, and it does not appear that the party's right of peremptory challenge was abridged in getting him off: *Burt v. Panjaud*, S. C. U. S., Oct. Term 1878.

A man offered as a juror is, no more than a witness, compelled to disclose under oath his guilt of a crime which would disqualify him. The party relying upon such disqualification must prove it by other evidence if the juror declines to answer: *Id.*

MINES. See *Trespass*.

Act of 1866—Ditches and Canals over Public Land.—The ninth section of the Act of Congress of July 26th 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes," only confirms to the owners of water-rights and of ditches and canals, on the public lands of the United States, the same rights which they held under the local customs, laws and decisions of the courts, prior to its passage; and confers no additional rights upon the owners of ditches, subsequently constructed: *Jennison, Executor of Titcomb, v. Kirk*, S. C. U. S., Oct. Term 1878.

The origin and general character of the customary law of miners stated and explained: *Id.*

By that law the owner of a mining claim and the owner of a water-right in California hold their respective properties from the dates of their appropriation, the first in time being the first in right; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed: *Id.*

By that law a person cannot construct a ditch to convey water across the mining claim of another, taken up and worked according to that law before the right of way was acquired by the ditch-owner, so as to prevent the further working of the claim in the usual manner in which such claims are worked, nor so as to cut off the use of water previously appropriated by the miner for working the claim, or for other beneficial purposes: *Id.*

MORTGAGE.

All Conveyances as Security for Money Lent—Parol Evidence.—It is the established doctrine, that a conveyance made as security for a loan of money whatever may be its form, will be treated by equity as a mort-

gage, and that parol evidence will be admitted to show that a deed absolute on its face was intended as such a security: *Butler v. Butler*, 46 Wis.

Personal Property to be subsequently Acquired.—In Rhode Island, a mortgage of personal property to be subsequently acquired, creates a lien on such property when acquired, which is valid in equity against the mortgagor or his voluntary assignee; *Williams v. Winsor*, 12 R. I.

The question whether a mortgage, which allows the mortgagor to retain possession of the mortgaged personalty or to sell and replace the same, is fraudulent as against his creditors, should be determined by a jury from the circumstances attending its execution: *Id.*

MUNICIPAL CORPORATION. See *Highway*.

Liability for Acts of Officers.—The City Council of Providence directed the highway commissioners to cut down a certain street to grade provided the adjoining owners agreed not to make any claim for damages. By inadvertence the cutting was done without the specified agreement on the part of one owner. In an action for damages brought by this owner against the city: *Held*, that the city was not liable: *Donnelly v. Tripp*, 12 R. I.

A municipal corporation is not liable for the acts of its officers though done under color of authority, unless such acts were authorized or ratified or done in good faith, pursuant to some general authority given: *Id.*

NEGLIGENCE.

Bailee for Hire—Presumption—Evidence.—Although where defendant's negligence is an essential element in plaintiff's cause of action, the burden is on plaintiff of proving such negligence, yet where plaintiff showed that his goods were injured while in possession of defendant as a bailee for hire, and that defendant when applied to by him, gave no account of the injury except merely that it occurred while defendant's agents were performing an act, which when performed with due care, does not ordinarily cause such an injury: *Held*, that this was evidence from which the jury might infer negligence: *Kirst v. Milwaukee, Lake Shore and Western Railway Co.*, 46 Wis.

NUISANCE.

Flowage—Interference with Highways.—In equity proceedings the question at issue between the complainant and the respondent resolved itself upon the proof into whether the complainant was entitled to equitable relief for the inundation of his land and of a private pass-way, connecting his land with a highway, which was caused by a dam built by the respondent, and also whether the complainant was entitled to equitable relief for the interruption thus caused to his access to the highway. It appearing that a new and more convenient highway than the old one had been laid out over and along the dam, and also that the slope of the dam covered part of the old highway and also that the location of the old highway had never been legally changed by the town authorities. *Held*, that the dam was a nuisance in law but not in fact; *Held, further*, that as the public received no detriment, the complainant could only have relief for his individual injury; *Held, further*, that the com-

plainant was entitled to relief for the inundation; *Held, further*, that the complainant would be sufficiently relieved by an enlargement of the water aperture of the dam. And it appearing that raising the grade of the private passway would give the complainant convenient access to the new highway: *Held*, that the interruption to the complainant's access to the highway was capable of pecuniary compensation and therefore remediable at law: *Held, further*, that the decree should be without prejudice to the complainant's legal remedy unless the parties preferred to have a master ascertain the complainant's damage: *Stone v. Peckham*, 12 R. I.

POSSESSION.

Prima facie Evidence of Title.—In an action of ejectment or trespass to land, actual possession, or receipt of rent by plaintiffs prior to eviction, is *prima facie* evidence of title, on which recovery can be had against a naked trespasser: *Burt v. Panjaud*, S. C. U. S., Oct. Term 1878.

Title prima facie implies—Extent of actual Possession.—Title draws after it possession of property not in adverse possession of another: *Moore v. Douglass*, 14 W. Va.

Actual possession of a part of a tract of land under a *bona fide* claim, and color of title to the whole, is possession of the whole, or so much thereof as is not in the adverse possession of others; *Id.*

And in such case the party in actual possession of such part has a sufficient possession of the residue of the tract to entitle him to the action of unlawful entry and detainer against a wrongdoer who enters upon such residue, who has not the right of entry thereon, but the owner of such residue, or those authorized under him, may lawfully enter upon such residue without force and hold the same: *Id.*

SPECIFIC PERFORMANCE

Matter of Discretion—Parol Contract respecting Land—Part Performance.—Generally when a contract respecting real property is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree specific performance of it, as it is for a court of law to give damages for a breach of it. But the court of equity may, under certain circumstances, refuse its aid and leave the parties to their legal remedies, or it may rescind the contract and place the parties in *status quo* by making compensation, &c.: *W. Va. O. & O. L. Co. v. Vinal*, 14 W. Va.

In the exercise of the equity branch of jurisprudence respecting the rescission and specific performance of contracts, the court is governed by that sound and reasonable discretion which governs itself as far as it may, by general rules and principles, but at the same time which withholds or grants relief according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties: *Id.*

In the case of parol contracts for land, partly executed, it is generally the duty of the court to exert proper means to ascertain the terms of the contract, whenever it clearly appears that a contract did exist upon the faith of which one of the parties has expended his money, &c., and this in order to prevent a failure of justice: *Id.*

Parol Contract about Land—Consideration.—A parol agreement between father and son, that on condition the son will enter upon a certain tract of land and improve it, the father will make him a deed for same, and in pursuance and on faith of such agreement the son enters upon the land and occupies and improves it, is sustained by a sufficient consideration, and should be specifically performed : *Lorentz v. Lorentz*, 14 W. Va.

Such contracts before they can be performed, in a court of equity must be established by competent and satisfactory proof, which must be clear, definite and certain : *Id.*

STATUTE. See *Constitutional Law*.

Construction of.—In construing a statute, aid may be derived from attention to the state of things as it appeared to the legislature when the statute was enacted : *Platt v. Union Pacific Railroad Co.*, S. C. U. S., Oct. Term 1878.

STREAM.

Riparian Rights—Use of Water by Upper Owner—Former Judgment.—In an action by a lower against an upper proprietor on a small running stream, where the wrong alleged was that defendant, by keeping a large number of hogs enclosed in a yard on his premises upon such stream, and so fouling the stream, had deprived plaintiff of his beneficial use of the water on his premises for culinary and other domestic purposes, the court charged the jury that each proprietor was entitled to the use and enjoyment of the stream in its natural flow, subject to its reasonable use by other proprietors, that each had an equal right to the use of the stream for the ordinary purposes of his house and farm, and for the purpose of watering his stock, even though such use might in some degree lessen the volume of the stream or affect the purity of the water ; that the lower proprietor had no superior right in this regard over the upper, that if in its natural state, the stream was useful both for domestic uses and for watering stock, but the use for ordinary stock purposes was more valuable or beneficial for all the owners along the stream than the use for domestic purposes, then the less valuable must yield to the more valuable use ; but that its reasonable use for all purposes should be preferred if possible ; and that the jury must determine from all the facts, taking into account the size, nature and condition of the stream, whether defendant made a reasonable and proper use of it. *Held*, on defendant's appeal, that there was no error in the instructions. *Hazeltine, Adm'r, v. Case*, 46 Wis.

While an appeal by defendant from judgment of a justice's court in plaintiff's favor in this action (which was tried by the justice without a jury), was pending in the circuit court, plaintiff commenced a second action before the justice for damages accruing to him *after the date of this action*, from defendant's use of the water of the same stream so as to deprive plaintiff of his reasonable enjoyment thereof ; his complaint containing averments very similar to those in this action, except as to time, and when the present action was tried, the second was pending in the circuit court on plaintiff's appeal from the justice's judgment upon a verdict in defendant's favor. *Held*, that the judgment last named was

not in any way conclusive as to the rights of the parties in this action : *Id.*

SUNDAY. See *Time*.

TIME.

Computation of—Sunday.—By the decree of a Probate Court commissioners were appointed on the insolvent estate of a decedent, and six months were allowed to creditors to prove their claims against the estate. The six months expired on Sunday. The commissioners held their last meeting on the following day : *Held*, that the acts of the commissioners were according to law : *Barnes v. Eddy*, 12 R. I.

Held, further, that the duty of the commissioners required them to sit on the last day of the six months : *Id.*

Whenever a given period is fixed within which an act must be done, Sundays which fall within the period make a part of it ; but if the period closes on Sunday the act may be done on the following day : *Id.*

TRESPASS. See *Possession*.

Possession as Evidence of Title—Mining Claims.—Possession of land by a plaintiff in trespass *quare clausum fregit* is *prima facie* evidence of title, and is sufficient for a recovery against a mere trespasser : *Campbell v. Rankin*, S. C. U. S., Oct. Term 1878.

While the local record of a mining community is the best evidence of the rules and customs governing their mining interests, it is not the best or only evidence of priority or extent of actual possession : *Id.*

The Act of Congress of May 10th 1872, section 5, gives no greater effect to the record of such mining claims than is given to the registration laws of the states, and this has never been held to exclude proof of actual possession, and of its extent as *prima facie* evidence of title : *Id.*

TRUSTEE. See *Equity*.

VENDOR AND PURCHASER.

Waiver of Lien.—If a contract is made for the sale of land, and nothing be said in the contract about the vendor's lien being reserved, and bond and personal security be taken for the purchase-money, this alone will not amount to a waiver of the vendor's lien, but if it be shown by direct evidence or by the circumstances of the case, that the vendor relied only on the bond and personal security, the vendor's lien is waived, and he would be required to execute a deed without reserving the lien. Before the passage of the statute requiring an express reservation of this lien on the face of the deed, the execution of the deed and the taking of personal security, would amount to a waiver of the vendor's lien : *Warren v. Branch*, 14 W. Va.

WATERS AND WATERCOURSES. See *Highway ; Mines ; Nuisance ; Stream*.

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CITIZENSHIP BY NATURALIZATION.

(Concluded from October No., p. 612.)

III.

THE legislation under which admission to citizenship in the United States formerly took place was the 3d paragraph of the 1st section of the Act of April 14th 1802, which declared, "That the court admitting such alien shall be satisfied that he has resided within the United States five years at least:" (2 U. S. Stat. at Large 153.) This act was subsequently modified by the 12th sect. of the Act of 3d of March 1813 (2 U. S. Stat. at Large 811), which reads, "That no person who shall arrive in the United States, from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not for the continued term of five years next preceding his admission, as aforesaid, have resided within the United States, without being at any time during the said five years out of the territory of the United States." But this last act was itself changed by the Act of 26th June 1848 (9 U. S. Stat. at Large 240), which declares, "That the last clause of the 12th section of the act" (that is to say, the section just above quoted), "hereby amended, consisting of the following words, to wit, 'Without being at any time during the said five years out of the territory of the United States,' be and the same is hereby repealed." These amendments left the law to

require that the applicant should be a resident of the United States for five years next preceding his admission to citizenship, but at the same time declared that uninterrupted habitation was not necessary: for a man may be, and frequently is, an inhabitant of one place while he is a resident of another; which is the case with all who leave a residence, with whatever view of duty, business or pleasure, but with the design of returning to it.

In the case of *Campbell v. Gordon*, 6 Cranch U. S. S. C. Rep. 182, the Supreme Court of the United States said: "The oath, when taken, confers upon him the rights of a citizen, and amounts to a judgment of the court for his admission to those rights. It is therefore the unanimous opinion of the court that William Currie was duly naturalized."

In the case of *Spratt v. Spratt*, 4 Peters U. S. S. C. 407, the Supreme Court of the United States said, speaking of naturalization: "The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry, and, like every other judgment, to be complete evidence of its own validity." The court, in giving judgment admitting an alien to citizenship, judges both the law and the fact, and its judgment is conclusive on both these questions.

It was the opinion of an American jurist (2 Kent 45), expressed forty years ago, that the doctrine of final and absolute expatriation required "to be defined with precision, and to be subjected to certain established limitations, before it can be admitted into our jurisprudence as a safe and practicable principle, or laid down broadly as a wise and salutary rule of national policy." English legislation for a long period declared that the quality of citizen, as the result of birth, follows the individual during his whole life, and the legislation of the United States inclined to this view; but a recent statute¹ contains provisions which enable, for the first time, a British subject to renounce allegiance to the crown, and also to resume his British nationality. The American doctrine on this subject for many years remained unsettled, owing to the fact that the legislation of Congress was in conflict with the doctrine of the United States

¹ 33 Vict. ch. xiv. An Act to amend the law relating to the legal conditions of aliens and British subjects, May 12th 1870.

courts, and this inconsistency which appeared in the naturalization laws was pointed out at an early date by an American editor (2 Kent 49, note). There have indeed been statesmen and cabinet officers who have denied *in toto* the doctrine of perpetual allegiance, and who would appear to have gone to the extent of holding that it was a maxim of American constitutional policy, as it was of ancient Rome, not to allow her citizenship to be shared with any other state. (Despatch of secretary of state to the United States minister at Berlin, in the case of *Hoyer ; Christian Ernst's Case*, 9 Opin. Att. Gen. 351.) And the United States government, in the absence of treaty or convention, has of late years gone to the extent of giving protection to naturalized citizens who have returned to their native country, against every new obligation or duty imposed by the laws after the act of naturalization. (Calvo, *Derecho Internacional*, vol. 1, p. 288, *et seq.* *Case of Liatio*, heretofore referred to, *ante* 601.¹) The Act of Congress of July 27th 1868, § 1 (15 Stat. at Large 223, 224), after reciting that the right of expatriation is a natural and inherent right of all people, &c., enacts that any declaration, instruction, opinion, order, or decision of any officer of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government. Under the erroneous impression that this act contained a provision, "that whenever it shall be duly made known to the president that any citizen of the United States has been arrested and is detained by any foreign government, in contravention of the intent and purposes of this act, upon the allegation that naturalization in the United States does not operate to dissolve his allegiance to his native sovereign, or if any citizen shall have been arrested and detained whose release upon demand shall have been unreasonably delayed or refused, the president shall be, and hereby is, empowered to suspend in part or wholly commercial relations with the said government, or, in case no other remedy is available, order the arrest, and to detain in custody any subject or citizen of the said foreign government who may be found within the jurisdiction of the United States, except ambassadors and other public ministers, and their domestics and domestic servants, and who has not declared his intention to become a

¹ Papers relating to the Foreign Relations of the United States, 43d Congress, 1st Session, Ex. Doc. 1, part 1, p. 1303.

citizen of the United States; and the president, shall, without delay, give information to Congress of any such proceedings under this act:" Phillimore said: "This strange reprisal, after the fashion of the First Napoleon, of seizing and imprisoning innocent foreign subjects, is novel in modern public law. It would be equivalent to a declaration of war against the state to which the subject belonged. No state has a right to dissolve the relations of native allegiance between a foreign subject and his state without that state's consent." (Commentaries on International Law, 2d ed. 1871, vol. 1, p. 385, note.) Legislation of this character would have been in violation of universal principles of justice, and would have been obnoxious to sharp criticism; but the learned author has fallen into error as to the law of the United States in this particular. No such law as that set forth in the text was ever enacted by the Congress of the United States. It is true, however, that the third section of the original act concerning the rights of American citizens in foreign states, which was passed by the House of Representatives, was to the effect and in the language criticised by Phillimore; but this whole section was stricken out by the Senate, which substituted the third section of the Act of Congress, of July 27th 1868; the amendment of the Senate was concurred in by the House, and the act as amended became the law. Congressional Globe, Washington, D. C., 1867, 1868, 2d Sess. 40th Congress, pt. 5, pp. 4445, 4451; 15 U. S. Stat. at Large 223, 224; U. S. Revised Statutes, sect. 2001, p. 352.¹

Since the passage of the Act of July 27th 1868, the United States, as heretofore indicated, has entered into treaty stipulations with nearly all the nations of Europe, by which the contracting powers mutually concede to subjects and citizens the right of expatriation, *on conditions and under qualification*. And if there shall arise conflict between the above Act of Congress and any treaty in this matter, it would seem that the treaty must be held to be of higher dignity and paramount; for the treaty is a contract between nation and nation in derogation of international law, and any case arising under treaty or convention would be subject to construction of public law, as varied or modified by treaty stipulations.

In the matter of residence, as a preliminary qualification for nat-

¹ Since this article was written, the writer has been advised by the author quoted that the error, which elicited this criticism, will be corrected in a forthcoming edition.

uralization, many nations have recently entered into treaty stipulations, by the terms of which the contracting powers have agreed to make an uninterrupted residence of five years in the adopted country a necessary qualification for admission to citizenship.¹ These treaties contain a provision providing for the punishment in case of return to the native country of a naturalized citizen or subject for offences committed against the country of adoption before emigration; and a provision for renunciation of citizenship by naturalization, on the return of the individual to the country of birth, and a residence of two years. Under these treaties the consideration what shall constitute "uninterrupted residence" within the meaning of the clause remains; and questions of difficulty and embarrassment will doubtless continue to arise on the construction of this clause. And, as between the contracting parties to a treaty containing a stipulation in these or similar terms, the objection is that, on this point of residence, it may be open, to the nation whose convenience in the particular case it suits, to deny the conclusiveness, as evidence of nationality, of a letter or certificate of naturalization. We have already seen that in practice the nations generally, in the absence of treaties, concede this character to a letter or certificate of naturalization regularly issued under municipal law.

By the terms of the treaty of naturalization between the United States of America and Great Britain, May 13th 1870, provision is made for the naturalization in either country of the subjects or citizens of the other, as well as for the renunciation of such acquired citizenship in such manner as shall be agreed upon by the governments of the respective countries. And the act heretofore referred to (33 Vict. c. 14), contains provisions from which it appears that Parliament has acted upon and adopted the substantial recommendations contained in the report of Her Majesty's commissioners. The first conclusion at which these commissioners arrived was: "That

¹ Austria and the United States, September 20th 1870; Grand Duchy of Baden and the United States, July 19th 1868; Bavaria and the United States, May 26th 1868; Belgium and the United States, November 16th 1868; Grand Duchy of Hesse and the United States, August 1st 1868; Mexico and the United States, July 10th 1868; North German Union and the United States, February 22d 1868; Sweden and Norway and the United States, May 26th 1869; Wurtemberg and the United States, July 27th 1868; Denmark and the United States, July 20th 1872; Ecuador and the United States, June 28th 1872. See *Treaties and Conventions between the United States and other Powers since July 4th 1776*. Washington Government Printing Office, 1871.

under a sound system of international law such a thing as a double nationality should not be suffered to exist." Nationality, London, 1869, p. 214.

It is the merit of the modern process of naturalization of aliens now under discussion, that the letter or certificate of naturalization constitutes such authentic proof of the nature and character of this intention as may not be questioned or denied. And generally acts of naturalization, by which is meant the admission to citizenship of aliens, are made matter of public record in the country of adoption. But as the country of origin is not regarded in this matter, unless by concession made under treaty, no provision is made for advising or acquainting the country of origin of the transfer of allegiance of her subject or citizen. From this omission, complications and embarrassments in the relations between nations have not infrequently arisen; the recurrence of which might be, to a great extent at least, guarded against.

As a method of acquiring citizenship, naturalization—imperfect and subject to some abuse as it still may be in certain quarters and countries—has the peculiar merit that it is made matter of public record, at least in the country of adoption. The learned chief justice, heretofore quoted, suggests that if nationality should become as it ought, matter of international concern, it would be highly expedient that an arrangement should be made for communicating the names of persons naturalized, or electing between two nationalities, to the agents of the states concerned, to be by them transmitted to their governments, so that no dispute as to the fact could afterwards arise.

Of the five years uninterrupted residence clause in the treaty between the United States and Prussia, on behalf of the North German Confederation, of the 22d February 1868, Lord Chief Justice COCKBURN says: "This treaty is ambiguous, and open to difficulty on two points. 1st. It is left uncertain whether the five years' residence required by the first article is to run from the time of the naturalization, or whether prior residence will be available to satisfy the condition; 2d. It is left in doubt whether on naturalized subjects quitting the country of adoption *sine animo revertendi*, and returning to their native country and thereby losing the citizenship of the former, the original nationality would revert."

Some controversy has lately arisen between the United States and the North German Confederation, over the case of Baumer, a native of Prussia, who had been naturalized in the United States,

and thereafter returned to Prussia; and the matter has been brought to the attention of Congress through joint resolutions providing for the termination of the naturalization treaty of 22d February 1868, between the United States and the North German Confederation. House of Rep., 45th Congress, 3d sess. bill 202 and 104. The official correspondence has not yet been published, but it is suggested in official circles that this case is a fair specimen of many arising in Germany, and which frequently embarrass the foreign relations of this country. In commenting upon this treaty soon after its conclusion, it was said (Calvo, *Derecho Internacional*, Paris, vol. 1, p. 288 *et seq.* note): "This treaty gives a satisfactory solution to the question presented by Lincoln, in his message of the 8th December 1863. In this message attention was called to the fact that foreigners had frequently been naturalized in the United States for the purpose of escaping obedience to the laws of their native country, to which, as soon as naturalized, they would return, claiming for all time the protection of the government of the United States. To prevent this abuse he declared it was necessary to fix some period, on the expiration of which foreigners who had been naturalized in the United States, and had returned to their native country, may not claim the protection of the republic."

IV.

In his last message to Congress (December 5th 1876), President Grant, referring to naturalization and expatriation, said: "I suggest no additional requirements to the acquisition of citizenship beyond those now existing, but I invite the earnest attention of Congress to the necessity and wisdom of some provisions regarding uniformity in the records and certificates, and providing against the frauds which frequently take place, and for the vacating of a record of naturalization obtained in fraud. These provisions are needed in aid and for the protection of the honest citizen of foreign birth, and for the want of which he is made to suffer not infrequently. The United States has insisted upon the right of expatriation, and has obtained after a long struggle an admission of the principles contended for by acquiescence therein on the part of many foreign powers and by the conclusion of treaties on that subject. It is, however, but justice to the government to which such naturalized citizens have formerly owed allegiance, as well as to the United States, that certain fixed and definite rules should be adopted

governing such cases and providing how expatriation may be accomplished. While emigrants in large numbers become citizens of the United States, it is also true that persons both native [born] and naturalized, once citizens of the United States, either by formal acts, or as the effect of a series of facts and circumstances, abandon their citizenship and cease to be entitled to the protection of the United States, but continue on convenient occasions to assert a claim to protection in the absence of provisions on these questions. * * * The delicate and complicated questions continually occurring with reference to naturalization, expatriation and the status of such persons as I have above referred to, induce me to earnestly direct your attention again to these subjects."

In a former message (December 7th 1875), the President called attention to the fact that "fraud being discovered, however, there is no practicable means within the control of the government by which the record of naturalization can be vacated, and should the certificate be taken up, as it usually is, by the diplomatic and consular representatives of the government to whom it may have been presented, there is nothing to prevent the person claiming to have been naturalized from obtaining a new certificate from the court in place of that which has been taken from him."

The want of a proper remedy and means for the vacating of any record fraudulently made, with a provision in the law for punishing the guilty parties to the transaction was, and is, *casus omissus*. And it was under this view of the existing law that the President urged action by Congress. Attention was also called to the necessity of legislation concerning the marriages of American citizens, contracted abroad, and concerning the status of American women who may marry foreigners, and of children born of American parents in a foreign country.

The original naturalization laws only extended to free "white" persons. But when Congress was engaged in framing the law of July 14th 1870, Senator SUMNER moved to strike out the word "white." Senator WILLIAMS then proposed to insert at the end of the section: "But this act shall not be construed to authorize the naturalization of persons born in the Chinese Empire."

The following debate is then reported:

MORTON. "This amendment involves the whole Chinese problem. Are you prepared to settle it to-night?"

STEWART. "Without discussion."

MORTON. "And without discussion? I am not prepared to do it."

SUMNER. "The senator says it opens the great Chinese question. It simply opens the question of the Declaration of Independence and whether we will be true to it. 'All men are created equal,' without distinction of color."

McCREERY offered as an amendment to the amendment: "Provided, that the provisions of this act shall not apply to persons born in Asia, Africa or any of the islands of the Pacific, nor to Indians born in the wilderness."

WARNER offered as a substitute for the original amendment: "That the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent." This was concurred in; yeas 20, nays 17: section 7 of the Act of July 14th 1870. Such was the law on the statute book when the revisers of the United States Statutes prepared their revision, which, in the first draft, was formulated as follows: "The provisions of this title shall apply to aliens of African nativity and to persons of African descent:" sect. 2169.

In 1875, when this draft was before Congress for amendment, attention was called to the fact that as the law stood, it would authorize the naturalization of Asiatic immigrants, and the above section was amended by inserting, in the first line, after the word "aliens", the words "being free white persons, and to aliens," &c.: Act of February 18th 1875.

The decisions of SAWYER, J. (United States Circuit Court, California, April 29th 1878), in *Ah Yup's Case*, and of CHOATE, J. (United States Circuit Court, New York, July 1879) on *Charles Miller's Application*, rest upon the law as amended. The writer has been informed that Yung Wing, of the Chinese Embassy at Washington, and other natives and subjects of the Emperor had been previously naturalized.

The opinion of Akerman, Attorney-General of the United States in 1871, in the case of *Moses Stern* (Opinions of Attorneys-General, vol. 13, p. 376), is sometimes cited in denial of the proposition that the record of naturalization is conclusive upon all the world, and may not be impeached, except for fraud, or want of jurisdiction in the court making the record. It is not authority for any such position. This opinion was given in a case which turned upon the construction of the Treaty of 1868 between the United

States and the North German Confederation; and the conclusion was doubtless greatly influenced and may have been justified, perhaps, by the circumstance that Stern, while in Prussia, never avowed himself an American, but, on the contrary, took a passport as a Prussian. When examined and tested in the light of international law, by the practice of nations, and under authoritative precedents, it will be found to stand alone. But Akerman adds: "But recitations in the record of matters of fact are binding only upon parties to the proceedings and their privies. The government of the United States was no party, and stands in privity with no party to these proceedings. And it is not in the power of Mr. Stern by erroneous recitations in *ex parte* proceedings, to conclude the government as to matters of fact." (*Sic.*) It will appear from this extract, that the Attorney-General, in this case, failed to recognise the fact that the certificate or record of naturalization is in the nature of a judgment *in rem*; and that the proceeding to obtain it is invariably *ex parte*. And he seems to be oblivious of the fact that these records are made, or at least are supposed to be made, by the court; and *not by the applicants for admission to citizenship*.

In *Levy's Case* (14 Opinions 509), Williams, Attorney-General, said that the proceeding to obtain naturalization was a judicial act, and that it has the force and effect of a judgment.

It follows, if the proposition laid down at the beginning of this article be correct, that in absence of treaty stipulations or concessions as to naturalization, the matter, in practice, is within the exclusive control of the power issuing the certificate or letter; and the judgment of the tribunal or court, to whom the power to grant the same is confided by the supreme power in the state, is conclusive as to law and fact everywhere and upon all the world. *United States v. The Acorn*, 2 Abbott's U. S. Rep. 443; *The People, &c., v. McGown*, 77 Ill. 644, and cases cited.¹

It is an universal principle, that, where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual

¹ See opinion of BLATCHFORD, J., Circuit Court of the United States, for the southern District of New York, *In the matter of Peter Coleman*, on habeas corpus. Opinion of FREEDMAN, J., Superior Court of New York, in *Christern's Case*, 1879.

rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are, *power in the officer, and fraud in the party*. All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive, legislative, judicial or special, unless an appeal is provided for, or other provision, by some appellate or supervisory tribunal, is prescribed by law: *United States v. Arredondo*, 6 Pet. (U. S.) 729-30, and cases cited.

When the inquiry is, "was there fraud?" it will be instructive to refer to the three rules laid down in *Conard v. Nicoll*, 4 Peters (U. S.) 295, and which were declared incontrovertible by the Supreme Court of the United States: *United States v. Arredondo*, *supra*.

When the inquiry is, "had the tribunal power or jurisdiction?" it will be instructive to consult Robinson (Rob. Practice, vol. 7, ch. 1, tit. 1).

In another case the U. S. Supreme court said: "The judgment of confirmation raises a presumption conclusive, while that judgment stands unreversed, that whatever was necessary to its legality was proved and found by the court, and it cannot be impeached collaterally: *Voorhees v. Bank of the United States*, 10 Pet. (U. S.) 193.

"The distinction," said LONGYEAR, J., announcing the decision in *The Acorn*, "between cases in which judgments may and those in which they may not be impeached collaterally, as derived from the authorities, and founded in common sense, may be stated thus: They may be impeached by facts involving fraud or collusion, but which were not before the court or involved in the issue or matter upon which the judgment was rendered. They may not be impeached for any facts, whether involving fraud or collusion or not, or even perjury, which were necessarily before the court and passed upon."

It has been, from time to time, urged that the same effect should not be given to a certificate of naturalization as is given, generally, to the judgments, sentences or decrees of courts of record; and that naturalization proceedings, as usually conducted, are virtually *ex parte*. But the answer to these suggestions is that the proceeding to obtain naturalization, in the United States, at least, is

a judicial one; and it is before a court which exercises a peculiar jurisdiction. The proceeding is, as it is technically termed, *in rem*, and the general rule, as to the effect and conclusiveness of a judgment, sentence or decree thereupon pronounced, is familiar: *Starkie on Evidence* *241-8.

A valuable and instructive discussion of the plea of *res judicata* as estoppel, and of the replication thereto, is found in *Robinson's Practice*, vol. 7, ch. 1, tit. 1, where the leading cases are compared, criticised and distinguished.

ALEXANDER PORTER MORSE.

Washington, D. C.

RECENT AMERICAN DECISIONS.

Circuit Court of the United States. District of California.

HO AH KOW v. MATTHEW NUNAN.

An ordinance of San Francisco, that every male person imprisoned in the county jail, under the judgment of any court having jurisdiction in criminal cases in the city and county, should immediately upon his arrival at the jail, have the hair of his head "cut or clipped to an uniform length of one inch from the scalp thereof," and made it the duty of the sheriff to have this provision enforced, is invalid, being in excess of the authority of the municipal body, whether the measure be considered as an additional punishment to that imposed by the court upon conviction under a state law, or as a sanitary regulation, and constituted no justification to the sheriff acting under it.

The ordinance being directed against the Chinese only, imposing upon them a degrading and cruel punishment, is also subject to the further objection, that it is forbidden by that clause of the Fourteenth Amendment to the Constitution, which declares that no state "shall deny to any person within its jurisdiction the equal protection of the laws." This inhibition upon the state applies to all the instrumentalities and agencies employed in the administration of its government; to its executive, legislative and judicial departments; and to the subordinate legislative bodies of its counties and cities.

The equality of protection thus assured to every one whilst within the United States, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others, and that in the administration of criminal justice, he shall suffer for his offences no greater or different punishment.

THIS was an action brought to recover damages for alleged maltreatment by the defendant, sheriff of San Francisco. The maltreatment consisted in having cut off the queue of the plaintiff, a queue being worn by all Chinamen, and its deprivation being

regarded by them as degrading and as entailing future suffering. Plaintiff was convicted of a misdemeanor, in violating a state statute "concerning lodging-houses and sleeping-apartments within the limits of incorporated cities," and sentenced to pay a fine of ten dollars, or in default of such payment to be imprisoned five days in the county jail. Failing to pay the fine, he was imprisoned. The defendant, as sheriff of the city and county, had charge of the jail, and during the imprisonment of the plaintiff cut off his queue.

Defendant pleaded a justification of his conduct under an ordinance of San Francisco, which declared that every male person imprisoned in the county jail, under the judgment of any court having jurisdiction in criminal cases in the city and county, shall immediately upon his arrival at the jail, have the hair of his head "cut or clipped to an uniform length of one inch from the scalp thereof," and made it the duty of the sheriff to have this provision enforced. Under this ordinance the defendant cut off the queue of the plaintiff. To this plea plaintiff demurred.

The opinion of the court was delivered by

FIELD, J.—The validity of the ordinance is denied by the plaintiff on two grounds: 1st. That it exceeds the authority of the Board of Supervisors, the body in which the legislative power of the city and county is vested; and, 2d. That it is special legislation imposing a degrading and cruel punishment upon a class of persons who are entitled, alike with all other persons within the jurisdiction of the United States, to the equal protection of the laws. We are of opinion that both these positions are well taken.

The Board of Supervisors is limited in its authority by the act consolidating the government of the city and county. It can do nothing unless warrant be found for it there, or in a subsequent statute of the state. As with all other municipal bodies, its charter—here the Consolidation Act—is the source and measure of its powers. In looking at this charter, we see that the powers of the board, and the subjects upon which they are to operate, are all specified. The board has no general powers, and its special power to determine the fines, forfeitures and penalties which may be incurred, is limited to two classes of cases: 1st. Breaches of regulations established by itself; and 2d. Violations of provisions of the consolidation act, where no penalty is provided by law. It can impose no penalty in any other case; and when a penalty

other than that of fine or forfeiture is imposed, it must, by the terms of the act, be in the form of imprisonment. It can take no other form. "No penalty to be imposed," is the language used, "shall exceed the amount of one thousand dollars, or six months imprisonment, or both." The mode in which a penalty can be inflicted, and the extent of it, are thus limited in defining the power of the board. In their place nothing else can be substituted. No one, for example, would pretend that the board could, for any breach of a municipal regulation or any violation of the consolidation act, declare that a man should be deprived of his right to vote, or to testify, or to sit on a jury, or that he should be punished with stripes, or be ducked in a pond, or be paraded through the streets, or be seated in a pillory, or have his ears cropped, or his head shaved.

The cutting off the hair of every male person within an inch of his scalp, on his arrival at the jail, was not intended and cannot be maintained as a measure of discipline, or as a sanitary regulation. The act by itself has no tendency to promote discipline, and can only be a measure of health in exceptional cases. Had the ordinance contemplated a mere sanitary regulation, it would have been limited to such cases and made applicable to females as well as to males, and to persons awaiting trial as well as to persons under conviction. The close cutting of the hair which is practised upon inmates of the state penitentiary, like dressing them in striped clothing, is partly to distinguish them from others, and thus prevent their escape, and facilitate their recapture. They are measures of precaution, as well as parts of a general system of treatment prescribed by the directors of the penitentiary under the authority of the state, for parties convicted of and imprisoned for felonies. Nothing of the kind is prescribed or would be tolerated with respect to persons confined in a county jail for simple misdemeanors, most of which are not of a very grave character. For the discipline or detention of the plaintiff in this case, who had the option of paying a fine of ten dollars, or of being imprisoned for five days, no such clipping of the hair was required. It was done to add to the severity of his punishment.

But even if the proceeding could be regarded as a measure of discipline, or as a sanitary regulation, the conclusion would not help the defendant; for the board of supervisors had no authority to prescribe the discipline to which persons convicted under the laws of the state should be subjected, or to determine what special

sanitary regulations should be enforced with respect to their persons. That is a matter which the legislature had not seen fit to intrust to the wisdom and judgment of that body. It is to the board of health of the city and county that a general supervision of all matters appertaining to the sanitary condition of the county jail is confided; and only in exceptional cases would the preservation of the health of the institution require the cutting of the hair of any of its inmates within an inch of his scalp: Act of April 4th 1870; Session Laws of 1869-70, p. 717. The claim, however, put forth that the measure was prescribed as one of health, is notoriously a mere pretense. A treatment to which disgrace is attached, and which is not adopted as a means of security against the escape of the prisoner, but merely to aggravate the severity of his confinement, can only be regarded as a punishment additional to that fixed by the sentence. If adopted in consequence of the sentence, it is punishment in addition to that imposed by the court; if adopted without regard to the sentence, it is wanton cruelty.

In the present case, the plaintiff was not convicted of any breach of a municipal regulation, nor of violating any provision of the consolidation act. The punishment which the supervisors undertook to add to the fine imposed by the court was without semblance of authority. The legislature had not conferred upon them the right to change or add to the punishments which it deemed sufficient for offences; nor had it bestowed upon them the right to impose in any case a punishment of the character inflicted in this case. They could no more direct that the queue of the plaintiff should be cut off than that the punishments mentioned should be inflicted. Nor could they order the hair of any one, Mongolian or other person, to be clipped within an inch of his scalp. That measure was beyond their power.

The second objection to the ordinance in question is equally conclusive. It is special legislation, on the part of the supervisors, against a class of persons, who, under the constitution and laws of the United States, are entitled to the equal protection of the laws. The ordinance was intended only for the Chinese in San Francisco. This was avowed by the supervisors on its passage, and was so understood by every one. The ordinance is known in the community as the "queue ordinance," being so designated from its purpose to reach the queues of the Chinese, and it is not

enforced against any other persons. The reason advanced for its adoption, and now urged for its continuance, is, that only the dread of the loss of his queue will induce a Chinaman to pay his fine. That is to say, in order to enforce the payment of a fine imposed upon him, it is necessary that torture should be super-added to imprisonment. Then, it is said, the Chinaman will not accept the alternative, which the law allows, of working out his fine by his imprisonment, and the state or county will be saved the expense of keeping him during the imprisonment. Probably the bastinado, or the knout, or the thumbscrew, or the rack, would accomplish the same end; and no doubt the Chinaman would prefer either of these modes of torture to that which entails upon him disgrace among his countrymen, and carries with it the constant dread of misfortune and suffering after death. It is not creditable to the humanity and civilization of our people, much less to their Christianity, that an ordinance of this character was possible.

The class character of this legislation is none the less manifest, because of the general terms in which it is expressed. The statements of supervisors, in debate on the passage of the ordinance, cannot, it is true, be resorted to for the purpose of explaining the meaning of the terms used; but they can be resorted to for the purpose of ascertaining the general object of the legislation proposed, and the mischiefs sought to be remedied. Besides, we cannot shut our eyes to matters of public notoriety and general cognisance. When we take our seats on the bench, we are not struck with blindness, and forbidden to know as judges what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation, and treat it accordingly. We may take notice of the limitation given to the general terms of an ordinance by its practical construction as a fact in its history, as we do in some cases that a law has practically become obsolete. If this were not so, the most important provisions of the constitution, intended for the security of personal rights, would, by the general terms of an enactment, often be evaded and practically annulled: *Brown v. Piper*, 1 Otto 42; *Ohio Loan and Trust Co. v. Debolt*, 16 How. 435. The complaint in this case shows that the ordinance acts with special

severity upon Chinese prisoners, inflicting upon them suffering altogether disproportionate to what would be endured by other prisoners, if enforced against them. Upon the Chinese prisoners its enforcement operates as "a cruel and unusual punishment."

Many illustrations might be given, where ordinances, general in their terms, would operate only upon a special class, or upon a class, with exceptional severity, and thus incur the odium and be subject to the legal objection of intended hostile legislation against them. We have, for instance, in our community a large number of Jews. They are a highly intellectual race, and are generally obedient to the laws of the country. But, as is well known, they have peculiar opinions with respect to the use of certain articles of food, which they cannot be forced to disregard without extreme pain and suffering. They look, for example, upon the eating of pork with loathing. It is an offence against their religion, and is associated in their minds with uncleanness and impurity. Now, if they should, in some quarter of the city, overcrowd their dwellings, and thus become amenable, like the Chinese, to the act concerning lodging-houses and sleeping-apartments, an ordinance of the supervisors, requiring that all prisoners confined in the county jail should be fed on pork, would be seen by every one to be levelled at them; and, notwithstanding its general terms, would be regarded as a special law in its purpose and operation.

During various periods of English history, legislation, general in its character, has often been enacted with the avowed purpose of imposing special burdens and restrictions upon Catholics; but that legislation has since been regarded as not less odious and obnoxious to animadversion than if the persons at whom it was aimed had been particularly designated.

But, in our country, hostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the fourteenth amendment of the constitution. That amendment, in its first section, declares who are citizens of the United States, and then enacts that no state shall make or enforce any law which shall abridge their privileges and immunities. It further declares that no state shall deprive *any person* (dropping the distinctive term citizen) of life, liberty or property, without due process of law, nor deny to *any person* the equal protection of the laws. This inhibition upon the state applies to all the instrumentalities and agen-

cies employed in the administration of its government; to its executive, legislative and judicial departments; and to the subordinate legislative bodies of counties and cities. And the equality of protection thus assured to every one, whilst within the United States, from whatever country he may have come, or of whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others, for the security of his person or property, the prevention or redress of wrongs and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others, and that, in the administration of criminal justice, he shall suffer for his offences no greater or different punishment.

Since the adoption of the fourteenth amendment, Congress has legislated for the purpose of carrying out its provisions in accordance with these views. The Revised Statutes re-enacting provisions of law passed in 1870, declare that "all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to *no other*." (Sec. 1977.) They also declare, that "every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States, or *other person* within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Sec. 1979.)

It is certainly something in which a citizen of the United States may feel a generous pride that the government of his country extends protection to all persons within its jurisdiction; and that every blow aimed at any of them, however humble, come from what quarter it may, is "caught upon the broad shield of our blessed constitution and our equal laws." (Judge BLACK'S argument in the *Fossat case*, 2 Wall. 703.)

We are aware of the general feeling—amounting to positive hostility—prevailing in California against the Chinese, which would prevent their further immigration hither, and expel from the

state those already here. Their dissimilarity in physical characteristics, in language, manners and religion would seem, from past experience, to prevent the possibility of their assimilation with our people. And thoughtful persons, looking at the millions which crowd the opposite shores of the Pacific, and the possibility at no distant day of their pouring over in vast hordes among us, giving rise to fierce antagonisms of race, hope that some way may be devised to prevent their further immigration. We feel the force and importance of these considerations; but the remedy for the apprehended evil is to be sought from the general government, where, except in certain special cases, all power over the subject lies. To that government belongs exclusively the treaty-making power, and the power to regulate commerce with foreign nations, which includes intercourse as well as traffic, and, with the exceptions presently mentioned, the power to prescribe the conditions of immigration or importation of persons. The state in these particulars, with those exceptions, is powerless, and nothing is gained by the attempted assertion of a control which can never be admitted. The state may exclude from its limits paupers and convicts of other countries, persons incurably diseased, and others likely to become a burden upon its resources. It may, perhaps, also exclude persons whose presence would be dangerous to its established institutions. But there its power ends. Whatever is done by way of exclusion beyond this must come from the general government. That government alone can determine what aliens shall be permitted to land within the United States, and upon what conditions they shall be permitted to remain; whether they shall be restricted in business transactions to such as appertain to foreign commerce, as is practically the case with our people in China, or whether they shall be allowed to engage in all pursuits equally with citizens. For restrictions necessary or desirable in these matters, the appeal must be made to the general government; and it is not believed that the appeal will ultimately be disregarded. Be that as it may, nothing can be accomplished in that direction by hostile and spiteful legislation on the part of the state, or of its municipal bodies, like the ordinance in question—legislation which is unworthy of a brave and manly people. Against such legislation it will always be the duty of the judiciary to declare and enforce the paramount law of the nation.

The plaintiff must have judgment on the demurrer to the defendant's plea of justification; and it is so ordered.

SAWYER, Circuit Judge, concurred.

The learned judge, who delivered the foregoing opinion, had two questions to deal with of no little difficulty and delicacy. The first relates to the power of the legislature to accomplish by indirect means that which it could not avow in its action and accomplish directly. The second is, what does the constitution forbid as unequal and class legislation?

It is matter of every-day observation that legislatures are accustomed to treat constitutional limitations as imposing no moral obligation whatever upon their members. If, therefore, their desires lead them to evade or break over the limitations, and they can do so without encountering direct and positive prohibitions, they do not hesitate to do so, and they violate the spirit of the law without scruple, while they keep within a strict construction of its words. Sometimes this may be done with impunity, because it is done under a pretence of something lawful, which no one is at liberty to disprove or dispute; as Congress prohibited the circulation of state bank-notes, while pretending merely to provide for the collection of a revenue from them: *Veazie Bank v. Fenno*, 8 Wall. 533. But where the purpose is apparent in the legislation itself, construed in the light of such facts as the court may notice judicially, so that extrinsic evidence is not necessary to unfold it, there is no reason why the judiciary should hesitate to stamp as unconstitutional the indirect and circuitous evasion of the fundamental law, any more than it should a violation that is direct and avowed.

Some of the cases in which legislatures have attempted to avoid the prohi-

bition of special legislation, by passing laws general in form, but applicable to single cases only, are instructive. It is known that many of the states have gone a great ways in requiring general legislation wherever it could be made applicable, and in forbidding special acts in many cases. These provisions are often found to run counter to the desires of legislators, and they are then evaded, if evasion is found to be practicable. Thus, a legislature forbidden to grant divorces, may undertake to empower a court to do so in a particular and exceptional case: *Teft v. Teft*, 3 Mich. 67; *Simonds v. Simonds*, 103 Mass. 572. Or, having no power to impose a pecuniary obligation upon a municipality, may attempt to do so indirectly, by giving validity and force to the unauthorized action of individuals: *Hasbrouck v. Milwaukee*, 13 Wis. 37; *Marshall v. Silliman*, 61 Ill. 218. See *Williams v. Bidleman*, 7 Nev. 68; *People v. Supervisor, &c.*, 16 Mich. 254. Or, being prohibited from passing incorporation acts, may attempt to so remodel and extend the corporate powers of an existing corporation as in effect to create a new corporation: *San Francisco v. Spring Valley Waterworks*, 48 Cal. 493.

Many such illustrations might be given, but the principle which underlies them all is the same. The case of *Devine v. Commissioners of Cook Co.*, 84 Ill. 590, is particularly instructive. It was there held, that designating counties as a class, according to a minimum population, which makes it absolutely certain but one county in the state can avail itself of the benefits of a law applicable to such class, is nothing but a device to evade the constitutional

provision forbidding special legislation, and is void for that reason. Compare *Welker v. Potter*, 18 Ohio (N. S.) 85, and *Kilgore v. Magee*, 85 Penn. St. 401, which seem to be *contra*, but are distinguishable.

If, therefore, the legislation condemned in the principal case was calculated and designed to be offensive to, and inflict pain upon, people of one nationality only, and would have been void if in terms restricted in its application to that people, the general terms in which it is couched ought not to save it from condemnation.

The existence of a particular evil, however, is sometimes the occasion for passing a general law; and the fact that but a single case is likely to come under it, cannot affect the power of the legislature to pass it, where the law in good faith is made general in its scope. There exists, for example, in the state of New York a communistic society, which is understood to hold and put in practice doctrines on the subject of sexual intercourse between its unmarried members, which are of vicious example and abhorrent to the moral sense of the people of the state; and it would be a singular and certainly a futile objection to a general law for the punishment of their practices, that because the practices did not exist outside of their society, therefore the law was partial and oppressive. The validity of a penal law can never be tested by the number who disregard it; on the contrary, the fact that nearly everybody abstains from the forbidden conduct is generally very good evidence that it ought to be forbidden.

But there is and can be no authority in the state to punish as criminal such practices or fashions as are indifferent in themselves, and the observance of which does not prejudice the community or interfere with the proper liberty of any of its members. No better illustration of one's rightful liberty in

this regard can be given than the fashion of wearing the hair. If the wearing of a queue can be made unlawful, so may be the wearing of curls by a lady, or of a mustache by a beau, and the state may, at its discretion, fix a standard of hair-dressing to which all shall conform. The conclusive answer to any such legislation is, that it meddles with that which is no concern of the state, and therefore invades private right. The state might, with even more color of reason, regulate the tables of its citizens, than their methods of wearing their hair; for the first might do something towards establishing temperance in eating, while the other would be simply absurd and ridiculous.

But if the state cannot regulate the fashions of the hair of those outside the prisons, what right can it have to regulate them for persons in confinement under its laws? In other words, what is there in the fact, that one is undergoing confinement for a breach of the penal laws that can enlarge the authority of the state in this regard?

The common impression that a prisoner under sentence is pretty much at the arbitrary disposal of his keeper, is not only exceedingly erroneous, but it is one that leads to many abuses. The principle that limits his power, we suppose to be clear enough: he may do whatever is necessary to give complete effect to the sentence of the law, but he cannot go a step further, because the prisoner is confided to him for that purpose, and for no other. He may, therefore, subject him to the restraint of irons, if necessary to his detention; he may compel him to submit to sanitary regulations essential to health; he may force him to work, if such is the sentence; he may require him to wear the prison uniform, not only because of its convenience, but because of its utility in preventing escapes; and he may compel the observance of other

regulations, which have the general purpose of the sentence in view, and are not purely arbitrary. But if female prisoners were subjected to regulations shocking to the modesty of a virtuous woman, or male prisoners to those of an indecent nature, there should be no difficulty in holding that their rights were violated. Convicts have all the rights of other citizens, except as these are limited by the sentence of the law and proceedings for its proper execution.

If the cutting off of the queue could be defended as a sanitary regulation, or as being needful and proper to prevent escapes, or as removing something that interfered with the performance of the convict's labor, when labor is a part of his punishment, there would be a show of reason for saying that the regulation came within the implied powers of the prison authorities. But nothing of this sort can be pretended. The wearing of the hair in this way is no more unhealthy than female fashions of the hair in general, and the convict can be kept as well and can work as well with it on as with it off. The regulation for the cutting off of the queue is, therefore, a regulation not important to the preservation of discipline in the prison, or to the due enforcement of the sentence to imprisonment, and is therefore illegitimate and illegal.

The avowed reason for establishing this regulation was that the dread of its enforcement would compel obedience to

the law by persons who feared neither the fines nor the imprisonment which the law imposed. Nothing more plainly than this avowal could show that the learned judge was right in holding that the regulation imposed a punishment. It could not have done so more distinctly had it provided that every day the convict remained in prison, he might be subjected to the discipline of the whip. No doubt this might have deterred some persons from the commission of crime, but it would not for that reason become legal. Punishments are limited by the sentence of the law, and whatever is imposed beyond that is illegal, irrespective of its tendency. Moreover, the law itself is limited in respect to the punishments for which it may provide. The constitution prohibits those of a cruel and unusual nature, but the requirement of equal protection of the laws to all persons is also prohibitory. When the law imposes a punishment which only a certain class of persons, because of peculiar but innocent habits, sentiments or beliefs, can feel, and imposes it for the avowed purpose of affecting this class as others are not affected, it seems plain that not only is the equal protection of the laws denied to the class, but that they are directly and purposely subjected to pains and penalties which others, of different habits, sentiments or beliefs, are never expected to feel.

T. M. C.

Supreme Court of Indiana.

BOWEN ET AL. v. SULLIVAN.

The finder of lost property has a title to it superior to that of any other person except the loser or real owner. The place of finding makes no difference in this rule.

An employee in a paper factory, whilst engaged in assorting a bale of old papers purchased by the proprietor for manufacture, found certain lost, genuine bank-bills enclosed in a clean, unmarked and undirected envelope, which formed part

of such bale ; and, to ascertain whether they were genuine, delivered them to the proprietor, on his promising to return them ; but he retained the same, notwithstanding the demand of the finder, who brought suit for the value thereof. *Held*, that the plaintiff was entitled to recover.

FROM the Carroll Circuit Court.

Ellen Quinn, a minor, found two fifty-dollar bank-bills on the premises of the appellants, and handed the same to them, requesting to be informed if they were genuine. Appellants retained the bills, declining to return them to the finder, on demand. The appellee, Catherine Sullivan, the guardian of said minor, instituted this suit to recover the value of said bills. Issues were formed and tried by a jury ; verdict for the plaintiff ; motion for a new trial overruled, and judgment on the verdict.

J. Applegate, for appellants.

C. R. Pollard, for appellee.

The opinion of the court was delivered by

PERKINS, J.—The pleadings, on which the cause was tried, were good on demurrer, but some of them might have been subject to a motion to make more certain : *Hart v. Crawford*, 41 Ind. 197 ; *Doman v. Bedunnah*, 57 Id. 219 ; *Wilson v. Kelly*, 58 Id. 586.

As bearing on this part of the case, we cite *Tancil v. Seaton*, 28 Grat. (Va.) 601, where it is decided, that “the finder of a bank-note, as against a bailee without reward, to whom he delivers it to be kept for such finder, has such a possessory interest in the note as entitles him to recover the same of the bailee, on his refusal to redeliver it to the finder on request, and in the absence of any claim of the rightful owner made known by him to such bailee.”

On the trial, the court, of its own motion, gave to the jury the following instructions, which were all that were given in the cause :

“The third and fourth paragraphs allege, in substance, that the plaintiff’s ward found two bank-notes, of the denomination and value of fifty dollars each, on the defendants’ premises (in their paper-mill) ; that her said ward handed said notes to one of the defendants, to ascertain if they were genuine, and upon a promise that he would return them to her ; that the defendants kept said notes and converted them to their own use ; therefore she prays judgment, &c.

"The second and third paragraphs of the answer aver, in substance, that the defendants are co-partners, engaged in the manufacture of paper, in Carroll county; that, for the purpose of their business, it is their custom to purchase rags of different colors and qualities; that the said bank-notes were purchased with other rags, in Kansas, by the defendants, and are their property; that the plaintiff's ward took said bank-notes from their premises, without right, but afterward returned them to the defendants.

"The burden of proof is upon the plaintiff. In order to entitle her to recover, she must prove the material allegations of her complaint by a preponderance of the testimony; that is, by a fair weight of the testimony. The finder of lost property is the owner of it as against every person except the loser, or real owner. If you believe from the evidence, that the plaintiff's ward found the said bank notes in the defendants' paper-mill, and if you believe said bank-notes were lost property, you should find for the plaintiff. The primary question is, were the notes lost property? If they were, it can make no difference whether they were found upon the highway, in the defendants' paper-mill, or in their dwelling-house; the difference between the highway, the place of business or the dwelling-house (so far as this case is concerned), is a difference only as to the degree of privacy; the place of business is more private than the highway, and the dwelling-house is more private than the place of business.

"But, if the bank-notes were lost property and the plaintiff's ward found them, it does not matter where she found them; they belong to her as against every person but the loser, or real owner. But, if you believe from the evidence, that, as alleged in the third and fourth paragraphs of the answer, the defendants had purchased said bank-notes as rags, then they were not lost property, and you should find for the defendants.

"As I have already said to you, the plaintiff must make out her case by a preponderance of the testimony. You cannot indulge in any presumption in her favor, but you have a right to draw natural inferences from all the facts proven; and, if you believe from the evidence, that the said bank-notes were found by the plaintiff's ward among the rags or paper belonging to the defendants, in their mill, and that said bank-notes got there by accident, and were not placed there purposely by the person of whom the rags and papers were purchased by the defendants, and the defend-

ants did not know they were among the rags when they made the purchase, then I instruct you that said bank-notes were lost property, and you should find for the plaintiff."

The evidence in the cause consisted of oral testimony.

Ellen Quinn's testimony was as follows :

"I am acquainted with the defendants. In May 1876, they were engaged in the manufacture of paper, about half a mile from Delphi. I am a half-sister of Ann Sullivan, who was working for the defendants in the spring of 1876. I went to the paper-mill of the defendants in the spring of 1876. I was not in their employ. My sister had been, for a week or two. I found some money in the paper-mill of defendants, in May 1876, on Wednesday. Up to that time I had never been in the employ of the defendants. I found the money in the mill, on the floor, in a clean envelope, not in a package. In about five minutes afterward I showed it to Charley McClane. He took it to Huchtenhouser to see if it was good, and Huchtenhouser took it to the defendant Abner T. Bowen. There were two fifty-dollar bills in the envelope. I found the envelope three or four feet from where the girls were assorting papers. There was no name or other mark upon the envelope. I threw the envelope back on the floor. The next morning I asked the defendant Abner T. Bowen for the money, and told him he promised to give it back. He did not give me the money, but offered to give me ten dollars, if I would be satisfied, which I refused to take. I asked him if he had bought this money or lost it. He said he had not. This money has never been returned to me. Charlie McClane was the first person I told about having found it. The defendant, Abner T. Bowen, got this money for the purpose of seeing whether it was good or not. He said it was genuine. I am sixteen years old."

And upon cross-examination this witness further testified

"I found this money in the room of the paper-mill where they assorted old papers for the purpose of manufacturing the same into new paper. The room was about 15 by 30 feet. There were five persons engaged there at the time in assorting. The old papers are received in bales which are placed upon the floor, cut open, and the contents taken out and put in screens. The persons then engaged there in assorting the papers were Sarah and Mary Alberts, Annie McClane, Mattie Kist and Alma Sullivan. I asked Abner T. Bowen if the money was good. He said it was. I asked him for

it. He asked me, if I thought the money belonged to me. I told him I thought it did until the proper person came. I then asked him, if he had bought the money or lost it. He said no. I meant by that, if he claimed it as his property. He said he did not. I told him I would like to have it. He offered me ten dollars, and asked me if I would take that and be satisfied. I said I would not. The room where this money was found is the assorting room of the paper-mill, up stairs. The envelope, in which it was, was nice, clean and new, and had no writing or mark upon it. There were papers scattered all over the floor when I found it. I don't think there was a space on the floor more than four inches square, not covered with old papers. I found this money about 3 o'clock in the afternoon, and when I picked it up was nearer to Annie McClane than any person else, and about three or four feet from her. There were three screens in this room and two persons working at each."

Abner T. Bowen, one of the defendants, and a witness for the defendants, testified as follows:

"Charlie and Huchtenhouser came to me together, Charlie said 'she wants the money back, even if it is not good.' Don't know that I said anything to him about returning it. The next morning I saw Ellen Quinn in the machine-room. She said, 'what about the money?' I said, 'it is good money; who do you think this money belongs to?' She said she supposed it belonged to me, but thought she needed it more than I did. I asked her what she would do about it. She said, just as I said. I then offered her ten dollars. She shrank back and refused to take it. Said I ought to give her at least half of it; if she had lost one hundred dollars and any one had found it and brought it to her, she would have divided equally with them. She repeated several times that she needed it worse than I did. I said that had nothing to do with it. She said she ought to have thrown it in the papers, and it would have been ground up, and I never would have received any benefit of it. I said nothing about not having bought it. That is about what I said, and would think about it. She said she found it in an envelope marked 'Kansas City.' She was working for us that week and the week before, receiving wages for her labor. I never gave her any authority to take those bills from the place where they were found."

On cross-examination he further testified:

“If that money was found in a bale of papers, we had bought it and paid for it. Huchtenhouser kept the accounts with the girls in the assorting room; so I can not certainly say whether Ellen was in our employ the day the money was found. I did not know that money was there. We did not get it by accident. I think it was purchased with old paper. I think Ellen was working for us the day the money was found. I think I have a memorandum of the day the money was found, but can't now tell the day nor month. It was entered on our cash book the day it was found. At the time I got the money I did not intend to give it back.”

The testimony of the foregoing witnesses represents the conflict in the testimony in the case on the part of the plaintiff and defendants. There was no evidence that the envelope containing the money had been accidentally or carelessly laid down or dropped in the paper-mill by a visitor at the mill, so that the cases of *McAvoy v. Medina*, 11 Allen 548, and *Lawrence v. The State*, 1 Humph. 227, are not applicable in the case at bar.

There was no evidence that the envelope was purchased by special contract, including it and its contents, so that the case of *Merry v. Green*, 7 M. & W. 623, is not applicable.

Ever since the case of *Armory v. Delamire*, 1 Strange 505, in which a chimney-sweeper's boy, having found a jewel, left it with a goldsmith to ascertain what it was, was held entitled to recover it, the law has been steady and uniform that the finder of lost property has a right to retain it against all persons except the true owner. *Tancil v. Seaton*, 28 Gratt. 601; *Lawrence v. Buck*, 62 Me. 275. And ordinarily the place of finding is immaterial. *Tatum v. Sharpless*, 6 Phila. 18, and cases cited.

The jury in the case now before this court might have found from the evidence that an envelope was picked up from the floor of the defendants' paper-mill by Ellen Quinn; was opened by her and found to contain two \$50 bills; that the bills were taken by her and the envelope returned to the floor; that the envelope was purchased by the defendants at the rate of two and a half cents per pound, as waste-paper, raw material, to be used in the manufacture of paper; that neither the seller of the envelope nor the buyer of it knew that it contained the bills in question, and only sold and bought and paid for the envelope; that the rightful owner of the money is still unknown. Had the notes or bills in question

been lying upon the floor, unenclosed when found, the case would have fallen within most, if not all, the approved authorities.

The distinguishing feature of the case is, that the bills were found contained in an article of property which had been purchased by and belonged to the defendants. Did that fact carry with it the property in the bills in question?

The case more nearly in point than any other which has fallen under our observation is *Durfee v. Jones*, 11 R. I. 588. DUFFEE, C. J., said: "The facts in this case are briefly these: In April 1874 the plaintiff bought an old safe and soon afterwards instructed his agent to sell it again. The agent offered to sell it to the defendant for \$10, but the defendant refused to buy it. The agent then left it with the defendant, who was a blacksmith, at his shop for sale for \$10, authorizing him to keep his books in it until it was sold or reclaimed. The safe was old-fashioned, of sheet-iron, about three feet square, having a few pigeon-holes and a place for books, and back of the place for books a large crack in the lining. The defendant shortly after the safe was left, upon examining it, found secreted between the sheet-iron exterior and the wooden lining a roll of bills amounting to \$165, of the denomination of the national bank-bills which have been current for the last ten or twelve years. Neither the plaintiff nor the defendant knew the money was there before it was found. The owner of the money is still unknown. The defendant informed the plaintiff's agent that he had found it, and offered it to him for the plaintiff; but the agent declined it, stating that it did not belong to either himself or the plaintiff, and advised the defendant to deposit it where it would be drawing interest until the rightful owner appeared. The plaintiff was then out of the city. Upon his return, being informed of the finding, he immediately called on the defendant and asked for the money, but the defendant refused to give it to him. He then, after taking advice, demanded the return of the safe and its contents, precisely as they existed when placed in the defendant's hands. The defendant promptly gave up the safe, but retained the money. The plaintiff brings this action to recover it or its equivalent."

The court held, that, as the purchase was of the safe, not the safe and its contents, the money was not embraced in the purchase.

"The plaintiff" (say the court) "claims that he is entitled to have the money by the right of prior possession. But the plaintiff

never had any possession of the money, except, unwittingly, by having possession of the safe which contained it. Such possession, if possession it can be called, does not of itself confer a right. The case at bar is in this view like *Bridges v. Hawkesworth*, 15 Jurist 1079. In that case, the plaintiff, while in the defendant's shop on business, picked from the floor a parcel containing bank-notes. He gave them to the defendant for the owner if he could be found. The owner could not be found, and it was held that the plaintiff as finder was entitled to them, as against the defendants as owner of the shop in which they were found. 'The notes,' said the court, 'never were in the custody of the defendant nor within the protection of his house, before they were found, as they would have been if they had been intentionally deposited there.' The same in effect may be said of the notes in the case at bar; for though they were originally deposited in the safe by design, they were not so deposited in the safe, after it became the plaintiff's safe, so as to be in the protection of the safe as his safe, or so as to affect him with any responsibility for them. The case at bar is also in this respect like *Tatum v. Sharpless*, 6 Phila. 18. There it was held, that a conductor who had found money which had been lost in a railroad car was entitled to it against the railroad company."

It is also claimed in this case, that the finding of the money was a wrongful act, and that, therefore, the defendants (appellants) have a right to hold the money. We do not concur in this view. The defendants insist that Ellen Quinn, the finder, was in their employ as a rag-assorter, and that, therefore, what she found while so in their employ belonged to them.

The evidence would have sustained such a finding and in support of the verdict, perhaps we should have been in favor of it. If she was so in the defendant's employ. the finding of the money was not wrongful. In the elaborate case of *Brandon v. Planters' and Merchants' Bank of Huntsville*, 1 Stewart 320, it was held that lost property found by a slave belonged to his master, but we have found no case to which this doctrine has been applied as between employer and employee. See *Tatum v. Sharpless*, and *Durfee v. Jones*, *supra*.

See, on this general subject, note to *Bailey v. The State*, 52 Ind. 462: *The N. Y. & Harlem Railroad Co. v. Haws*, 56 N. Y. 175.

It is claimed that the appellants, in purchasing the envelope containing the bills by weight, purchased the bank-bills in ques-

tion. Their existence was unknown when the envelope was purchased, and their weight was so infinitesimally small, compared with their value, that we do not concur in this proposition. It is unreasonable.

The judgment is affirmed, with costs.

That the finder of a lost chattel has a special property in the article found which will entitle him to possession thereof as against all the world but the real owner, is and has been the general rule of law ever since the decision by Lord Chief Justice PRATT in *Armory v. Delamire*, 1 Strange 504, where the chimney-sweeper's boy who found the jewel was held entitled to it as against all but the real owner, and was allowed to recover from one who subsequently withheld it from him. This rule has not been departed from, and has been enforced in some quite recent cases. See *Laurence v. Buck*, 62 Me. 275 (1874); *Tuncil v. Seaton*, 28 Gratt. 601 (1877); *Durfee v. Jones*, 11 R. I. 588 (1877). Trover may be maintained by the finder, possession being a sufficient title in the absence of a superior one, upon which to maintain that action: *Sutton v. Buch*, 2 Taunt. 302 (1810); *Clark v. Maloney*, 3 Harrington 68 (1839); *Brown v. Ware*, 25 Me. 411 (1841); and the defendant in trover cannot set up as a defence a title in a third person without deriving to himself title from that third person: *Pinkham v. Gear*, 3 N. H. 484 (1826); *Duncan v. Spear*, 11 Wend. 53 (1833); *Harker et al. v. Dement*, 9 Gill 7 (1850).

It is, however, rarely that a contest has arisen, nor at the present day can we easily imagine that a contest could arise, over the rule itself, but in many cases it has been alleged either that what is called a finding was not such in law, or that the circumstances arising from various sources connected with the nature of the thing found, the place of finding or the relations borne by the finder to a

third person took the case in question out of the general rule. Some of these excepting circumstances were alleged to exist in the principal case, and the plaintiff's right was claimed to have been controlled by the circumstances, that the notes were found on the floor of the defendant's mill, that the notes had probably been purchased amongst some rags by the defendants, which it was claimed gave a right of possession, though the purchase was an unwitting one; and, though this claim seems to have been very doubtfully supported by the evidence, by the circumstance that at the time of finding the finder was in the defendants' employment. The case then suggests sundry considerations with regard to the law governing the rights of a finder as against all but the true owner of the article found, and we propose to consider,

1st. When property is considered as lost and found.

2d. How the special property acquired by the finder is affected by the *character* of the thing found.

3d. Whether the rights of the finder are affected by the *place* in which the lost article is found.

4th. How far the rights of the finder are affected by a relationship subsisting between him and a third person as that of master and servant; and

5th. We will consider the claim which a finder has against the true owner for compensation for finding and recovering an article, or for expense incurred in taking care of it; though this subject is rather suggested by than involved in the principal case.

First, then—*When is property considered as lost and found?* On this head it

may be remarked that a thing must be really lost to the owner before it can be found; and property which the owner merely and intentionally lays down or knowingly deposits in a place and then forgets for a time where he has put it, is by no means to be considered in a legal view as lost. As said by BREKSE, J., in *Lawrence v. The State*, 1 Humph. 228 (1839), "The loss of goods in legal and common intendment, depends upon something more than the knowledge or ignorance, the memory or want of memory of the owner as to their locality at any given moment. If I place my watch or pocket-book under my pillow in a bed-chamber, I may leave them behind me; but if that is all, I can not be said with propriety to have lost them. To lose is not to place anything carefully and voluntarily in the place you intend and then forget it; it is casually and involuntarily to part from the possession; and the thing is then usually found in a place or under circumstances to prove to the finder that the owner's will was not employed in placing it there." In that case a customer in a barber's shop had placed his pocket-book upon a table therein, and his attention being attracted by a fight in the street, he had gone out of the shop forgetting the pocket-book, which the barber afterwards picked up and appropriated; it was held by the court that the pocket-book had not been lost, and therefore that the act of the barber in appropriating it was not finding but felonious taking. Somewhat similar in principle to this case was *McAtvoy v. Medina*, 11 Allen 548 (1866), where the plaintiff picked up a pocket-book in a barber's shop and handed it to the barber to keep for the true owner. The true owner did not appear and the plaintiff sued the barber for the book. In the opinion of the court, DEWEY, J., said, "This property is not under the circumstances to be treated as lost property in that sense in which the finder

has a valid claim to hold the same until called for by the true owner. The property was voluntarily placed upon a table in the defendant's shop, by a customer of his, who accidentally left the same there and has never called for it. The plaintiff also came there as a customer and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant owner to use reasonable care for the safe-keeping of the same until the owner should call for it." His honor then distinguished the case from *Bridges v. Hawksworth*, *infra*, and remarked on its resemblance to *Lawrence v. The State*. In *Kincaid v. Eaton*, 98 Mass. 139 (1867), the same doctrine was held, although in that case the owner of the property had himself considered it so far lost that he had advertised a reward for its recovery. The property in question, again a pocket-book, was picked up from a desk in a banking-house, where the owner had left it accidentally, on going out of the bank, by a boy who shortly after came into the bank on an errand. Led by the advertisement the boy took the pocket-book to the owner, who while giving him a gratuity, refused to pay the reward offered; an action being brought therefor, the court gave judgment for the defendant, on the ground that the reward was offered for the recovery of lost property and that as the pocket-book was not, legally speaking, lost, the reward was not earned. See also, to the same effect, as to what constitutes losing, *State v. McCann*, 19 Mo. 249 (1843); *People v. McCarren*, 17 Wend. 460 (1837).

As to the finding it may be remarked, in addition to what has incidentally been suggested by what has gone before, that the finding must be in good faith, as said by STROUD, J., in *Tatum v. Sharpless*, 6 Phila. 18, "The right of the finder depends on his honesty and

the entire fairness of his conduct. The circumstances attending the finding must manifest good faith on his part. There must be no reason to suspect that the owner may be known to him or might have been ascertained by proper diligence." Therefore, if one find goods whose owner he knows or can readily ascertain from marks upon the goods, or from the circumstances under which he finds them and appropriates them to himself, he will not be regarded as a finder but as guilty of larceny: *Merry v. Green*, 7 M. & W. 623 (1841); *Wynne's Case*, 1 Leach C. C. 460 (1784); *Cartwright v. Green*, 8 Ves. 405 (1803); *State v. Weston*, 9 Conn. 527 (1833). And this is the case even if his intentions on first finding the goods were honest, if he afterwards determine to appropriate them to himself: *Wynne's Case*. Besides this, the possession acquired by finding must be one known to the finder himself as such; no mere physical possession, as for instance that of bills hidden away in the cracks of a chest, or in a secret drawer without knowledge on the part of the owner of the receptacle, of their existence, or as in the principal case, notes in a bundle of rags, will constitute a genuine possession acquired by finding—it must be by an intelligent, known act. An excellent illustration of what is not a good possession is afforded by the case of *Durfee v. Jones*, 11 R. I. 588, and also by *Merry v. Green*, *supra*, though the act through which possession was claimed to have accrued was not finding but purchase. The plaintiff had purchased a secretary, at the sale of a gentleman's effects, for the sum of 1*l.* 6*d.* In repairing the article there were discovered some secret drawers, and in them some notes and guineas, which the plaintiff appropriated. He was arrested on a charge of larceny, but was discharged, and then brought an action for assault and false imprisonment, and obtained a ver-

dict. PARKE, B., in giving the opinion of the Exchequer in granting a new trial, said, "It was contended that there was a delivery of the secretary and the money in it to the plaintiff as his own property, which gave him a lawful possession and that his subsequent misapplication did not constitute a felony. But it seems to us that though there was a delivery of the secretary, and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it nor the vendee to receive it; both were ignorant of its existence, and when the plaintiff discovered * * * the purse and money it was a simple case of finding," and, of course, in that point of view, the *bona fides* of the plaintiff's action became of importance. We may conclude then, that if a person should find an article and thereby acquire a special property therein, and after it had passed out of his possession another should discover therein money or other valuables, of which the finder had known nothing, the special property in the receptacle would give to the finder no title to the after-discovered contents.

2. The second matter to be considered is: *How the special property acquired by the finder is affected by the character of the thing found.* The general rule as to a chattel, properly so called, has been already stated; as to choses in action it would seem to be the rule that the finder obtains no right either to the thing represented or the instrument of evidence found. As a familiar example of this may be instanced, the finding of a bill of exchange or promissory note, where the finder acquires no such property as will enable him either to defend in trover or to maintain an action against the maker or acceptor: *Byles on Bills* 360. This rule, however, is by no means of universal application, and at the present day the law would seem to recognise the fact that there are choses

in action which generally pass and are treated as chattels, and as to them to allow a special property to be acquired by finding as in the case of chattels. This conclusion was not, however, arrived at at once, In *McLaughlin v. Waite*, 9 Cowen 670 (1827) which was a case involving the right of the finder of a lottery ticket to recover the money called for by it, SAVAGE, C. J., compared the lottery ticket to a bank-note, and held that there could be no recovery. On appeal (5 Wend. 404), in affirming the judgment of the Court below, WALWORTH, Ch., said: "This principle [i. e. the rule as to chattels] is not applicable to the present case. A negotiable instrument, a banker's check, is a mere chose in action or evidence of the right of the real owner; the lottery ticket vendor's certificate can have no greater validity. All property in choses in action must depend on a contract either express or implied. It is not property but an evidence of property. * * * If property is abandoned it is in a state of nature, and the first possessor is entitled to it; but if a right in action or contract for the delivery of property is voluntarily relinquished by the person entitled to the same, the right is gone." It may be noted that the Court of Appeals by no means unanimously agreed in the opinion of the chancellor, for ALLEN, Senator, delivered a strong dissenting opinion, and the vote on affirmance was fifteen for and ten against. We much question whether the case would be considered authority at present, and the reasoning of the chancellor has been criticized in a later case, which seems to be a much better exponent of the law as to such choses in action as bank-bills. In *Tancil v. Seaton*, 28 Gratt. 601 (1877), a bank-note had been found by the plaintiff who intrusted it to the defendant, from whom it was stolen, and an action was brought to recover its value. Amongst other defences it was set

up that property in a bank-note could not be acquired by finding. BURK, J., after holding that money would follow the rule of *Armory v. Delamire*, said: "Bank-notes are not money in a strict sense,* * * but for most purposes, as the transaction of business and by common consent, they are considered and treated as money. 'They are not esteemed' says Lord MANSFIELD, 'as goods, securities or documents of debt; but are looked on as money, as cash in the ordinary course and transaction of business by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes.' * * * *Miller v. Race*, Burr. 452. Such being their character we can see no good reason why the finder of a bank-note of a solvent institution does not acquire by the finding the same title as the finder of a personal chattel, and why he is not entitled to the same remedies against third parties." We may note that *McLaughlin v. Waite*, would seem to be of doubtful authority, except possibly as to the chose in action, (viz: a lottery ticket), directly involved, even in New York, for in *Matthews v. Hansell*, 1 E. D. Smith 393; (1852), the contest was over some bank-notes which had been found by the plaintiff, and the New York Common Pleas did not apparently consider the character of the property in question any obstacle to a recovery. To sum up, we think, that on this head the law may be stated: That while in general the finding of a chose in action confers no title upon the finder, yet choses in action which by the common consent and the current action of men are treated as chattels will be considered as supporting a special property in their finder.

3. *As to whether the rights of the finder are affected by the place in which lost chattels are found.* It must here be premised that the place of finding is not here considered where it enters

into the question of the *bona fides* of the finder, as in *Lawrence v. State, Wynne's Case*, and cases of that class, but only as to whether it affects the title acquired by a *bona fide* finding. On this head the rule would seem to be that the place of finding makes no difference in the title of the finder, and that the owner of the premises upon which a chattel is found, acquires no title to the chattel as a *quasi accretion*. This is the English doctrine, and, although in *Matthews v. Hansell, supra*, WOODRUFF, J., said that he would hesitate to endorse it, may be regarded as the law in this country also. It is probably best exemplified in England by the case of *Bridges v. Hawkesworth*, 15 Jurist 1079 (1851), and in the United States by the carefully considered case of *Tatum v. Sharpless*, decided by the District Court of Philadelphia, at a time when that court was composed of SHARSWOOD, P. J., STROUD and HARE, JJ. In the first case, the plaintiff had picked up a parcel of Bank of England notes on the floor of the defendant's store, which he had entered on business, and had given them to the defendant to keep for the owner. The notes were duly advertised, but were never claimed by the owner. After three years the plaintiff demanded the notes, but the defendant refused to surrender them. PATERSON, J., said: "The case resolves itself into the simple point * * * whether the circumstance of the notes being found in the defendant's shop gives him, the defendant, the right to have them as against the plaintiff who found them. * * * It was well asked on the argument if the defendant has the right *when* did it accrue to him? If at all it must have been antecedent to the finding by the plaintiff, for that finding could not give the defendant any right. If the notes had been accidentally kicked into the shop [street?] and then found by some one passing by; could it be

contended that the defendant was entitled to them, from the mere fact of their being originally dropped in his shop? If the discovery had never been communicated to the defendant, could the real owner have had any cause of action against him because they were found in his house? Certainly not. The notes never were in the custody of the defendant nor within the protection of his house before they were found, as they would have been had they been intentionally deposited there."

In *Tatum v. Sharpless*, the plaintiff, a conductor of a street-car, found in his car a pocket-book, which he delivered to the defendant, the receiver of the railway company, who duly advertised it. The custom of the company was to retain lost articles for a year, and then, if not called for, to return them to the finder. A year having elapsed and no claimant appearing, the conductor applied for the pocket-book, which was refused to him. The court gave judgment for the conductor, saying, after noticing the English cases, "The important point in these decisions was that the place in which a lost article is found does not constitute any exception to the general rule of law that the finder is entitled to it as against all persons except the owner."

4. Upon the question as to *how far* ✓ *the right of the finder is affected by the fact that he stands in the relation of servant to a third person*, the authorities we have met with, with one exception, and that exception more apparent than real, are uniform in substance that the fact does not deprive the finder of his right or vest it in the master. That this is the only rule consonant with reason and justice, will be seen by a very brief consideration of what the relation of master and servant, except in the case of slavery, is. It is a contract for services of a certain kind, specified in the contractor implied from the character of the position, a work assumed

by the servant; as the engagement of a domestic servant as such, without more, would constitute an engagement to perform household duties, perhaps run errands, and do such work as is generally connected with the position of domestic servant; it is not a contract whereby the servant gives up all his rights, or merges his identity in, or surrenders his freedom of action to his master, except so far as the purposes of the contract or position require; of course, whatever he does as servant, or within the scope of the contract, is for his master's benefit, but not what he does without such scope. Of course, if a master were to engage a servant expressly to search for lost articles of third persons for him, the lost article found by such servant would become the master's property, but it can be hardly said that in an ordinary case of hiring in any capacity, or for any kind of work, the search for lost articles, or the finding, accidentally, of lost articles of third persons, for the benefit of the master, is in the contemplation of the parties to the contract.

The question was raised in *Ellery v. Cunningham*, 1 Met. 112 (1840), where the mate of a vessel had found floating two bales of cotton in port, and it was contended by counsel for the owners of the vessel (citing Bacon's Abr. tit. *Master and Servant*, Reeve's Domestic Relations 343, and 1 Com. on Contracts), that the bales having been found by a servant belonged to his masters, the vessel owners, and therefore, that there was no consideration for a promise by the owners who had received the cotton from the mate to account for it to him if they could not find the owners. SHAW, C. J., did not notice the argument drawn from the relation of master and servant, but held that there was sufficient consideration for the promise in the surrender of the cotton, the mate having acquired a special property therein. In *Matthews v. Hansell*, *supra*, a servant who had found bank-notes in the

house of her employer, was allowed to maintain an action for them against a third person. In this case the employer assented to the action, so that his rights were not passed upon. The same point was raised in *Tatum v. Sharpless*, and there rested on the responsibility of the master for his servant's actions; but STROUD, J., said: "It was suggested that the relation between the plaintiff and the company was that of master and servant, and that probably should the parcel found be surrendered by the company to the plaintiff, the true owner, should he appear and prove his property, might compel its delivery or damages for withholding it. If the law would sustain such a demand, there would be very firm ground for the defendant to stand upon; no authority of the kind was referred to on the argument, and I have not been able to meet any."

The only case which we have been able to find which recognises a right in the master of the finder, as master, for, of course, cases involving seigniorial rights stand on an entirely different ground, is *Brandon v. Planters' and Merchants' Bank*, 1 Stew. (Ala.) 320 (1828); but in that case the finder was a slave, and the law recognised no rights of property in a slave, whose whole time and all his services, of whatever kind, belonged to his owner; consequently, as there was no contractual relation between owner and slave, the case is not to be considered with reference to that relation of master and servant which arises out of a contract either express or implied.

5. The fifth subject—the claim which a finder has, against the true owner of a chattel found, for compensation for finding or recovering the article, or for expense incurred in the care of it, is, as we have already remarked, not directly involved in the decision of the principal case, but is suggested by it.

At first sight natural justice might

seem to require that a person who has found and taken care of, or, perhaps, at great trouble and expense, has recovered property belonging to another, should have a lien upon the property, if not for the voluntary service of capture, at least for the outlay upon and services to the property after it has come into his hands. Such, however, is not the case. The civil law is thus stated by Domat: "He who has found a thing that is lost is obliged to preserve it and take care of it in order to restore it to its owner, * * * and whenever he does restore it, whether it be money or any other thing, he cannot detain any part of it, nor demand anything for having found it:" 2 Cush. Domat, pt. 1, tit. 2 IX. § 2. This is recognised as the common law, also by HUNT, J., in *Sheldon v. Sherman*, 42 N. Y. 484 (1870). In *Etter v. Edwards*, 4 Watts 63 (1838), SERGEANT, J., said: "Treating the defendant as the finder of lost property, it is well settled that he had no lien for expenses gratuitously incurred in taking care of it." See also *Nicholson v. Chapman*, 2 H. Blackst. 254 (1793); *Binsten v. Buck*, 2 W. Blackst. 1117; *Preston v. Neall*, 12 Gray 222 (1838).

Whether the finder having no lien, has even any claim for services or expenses in finding or recovering the lost article, would seem not to be clearly settled. The passage in Domat above quoted and recognised, would seem to deny the existence of any such claim, but in *Nicholson v. Chapman*, *supra*, EYRE, L. C. J., apparently considered it a matter of doubt, and said: "This is a case of mere finding and taking care of the thing found for the owner. This is a good office and certainly entitles the party to some reasonable recompense from the bounty, if not from the justice of the owner; and of which, if he were refused, a court of justice would go as far as it could go towards enforcing the payment; * * * perhaps it is better that these voluntary acts of

benevolence should depend on the moral duty of gratitude. In *Amory v. Flynn*, 10 Johns. 102 (1813), the Court (KENT, C. J., THOMPSON, SPENCER, VAN NRESS and YATES, JJ.), was of opinion that if a person who had captured some runaway geese had been put to any expense in securing them, such expense ought to be refunded, and SERGEANT, J., in *Etter v. Edwards*, *supra*, said: "It seems it remains yet to be authoritatively decided what are the duties of a finder of lost property, and whether he can recover compensation for the labor and expenditure he may voluntarily bestow upon it; or whether, in the absence of a promise of reward, the obligation of the owner is an imperfect one, resting merely on his bounty." See also *Bartholomew v. Jackson*, 20 Johns. 28 (1822), where the court seemed to be of opinion that a merely voluntary service conferred no right of action, no matter how great the value of such service, or the loss incurred in its performance.

While, however, the finder has, as such, no lien, and while, for the mere finding his right to compensation even is doubtful, though expense is involved therein, yet if he necessarily lays out expense upon the article found, he has a right to recover compensation therefor. Again, to quote Domat: "The person to whom one restores the thing which he had lost, is obliged on his part to repay the money that has been laid out in keeping the thing or in delivering it to him, as if it was some strayed beast which it was necessary to feed, or the carriage of the thing from one place to another, had obliged the person in whose custody it was, to be at some charges, or, if any money had been laid out in advertisements or in having the thing cried to give notice to the owner." In *Preston v. Neall*, *supra*, METCALF J. said: "The law which is applicable to cases of deposit by finding * * * is to be applied to this case * * * although in

cases of the deposit above mentioned the depositaries have no lien on the property, yet we are of opinion that they are legally entitled to compensation for the care and expense of keeping and preservation." See also *Chase v. Corcoran*, 106 Mass. 286 (1871).

Of course what has been said as to the non-existence of a lien in favor of the finder does not apply in cases where a lien is given by contract. It is well settled that a lien may be given by contract (*Baker v. Hoag*, 7 Barb. 113 (1849)), and the offer of a reward for the finding and return of a lost article, acted upon, is equivalent to a contract, and will confer a lien upon the finder to the extent of the reward. In *Wentworth v. Day*, 3 Metc. 352 (1844), in which a reward had been offered for the recovery of a lost watch, SHAW, C. J., said: "If the loser * * * will make an express promise of reward either to a particular person or in general terms to any one * * * and in consequence of such offer one does return it to him, it is a valid contract. Until something is done in pursuance of it, it is a mere offer and may be revoked. But if before it is retracted, one so far complies with it as to perform the labor for which the reward is stipulated, it is the ordinary case of labor done on request and becomes a contract to pay the stipulated compensation. * * * But the more material question is whether under the offer 'the finder' had a lien. * * * In many cases the law implies a lien from the presumed intention of the parties arising from the relation in which they stand. Take the ordinary case of the sale of goods where the parties are strangers to each other, * * * the vendor has a lien on the property for the price, and is not bound to deliver it till the price is paid, nor is the purchaser bound to pay till the goods are delivered. They are acts to be done mutually and simultaneously. * * * [In the pres-

ent case] the natural, if not the necessary implication, is that the acts of performance were to be mutual and simultaneous; the one was to give up the watch on payment of the reward; the other to pay the reward on receiving the watch." See also *Cummings v. Gann*, 52 Penn. St. 484 (1866). We may also remark that where a reward is offered for the recovery of goods, which are naturally devisable, a recovery of a portion of the goods will entitle the person returning them to a *pro rata* share of the reward offered: *Symmers v. Frazier*, 6 Mass. 344 (1810). It must, however, be noted, that in order to sustain a lien, the reward offered must be of a definite character, a specified sum, as the law does not favor indefinite liens, and therefore, the offer of a "reward," a "liberal reward," or a "suitable reward," will not entitle the finder to hold the article found until what is a proper, liberal or suitable reward is settled. The question is well discussed in *Wilson v. Guyton*, 8 Gill 213 (1849), where the plaintiff had offered a "liberal reward" for the recovery of his horse, and, having possibly rather peculiar views of liberality, had refused to give the defendant three dollars, the amount claimed by him, whereupon the defendant refused to surrender the horse and action was brought. DORSEY, C. J., while recognising the law to be that where a reward was offered a lien would be given, said: "But in the case before us, there is no ground for the implication of such a lien from the compact of the parties. There was no fixed or certain reward offered. * * * The offer was to pay a 'liberal reward.' Who was to be the arbiter of the liberality of the offered reward? It could not be supposed that the owner by his offer designed to constitute the recoveror of his property, the exclusive judge of the amount to be paid him as a reward, and it is equally unreasonable and unjust to say that the owner should

be such exclusive judge. In the event of a difference between them upon the subject, the amount to be paid must be ascertained by the judgment of the appropriate judicial tribunal. This would involve delays incident to litigation, and it would be a grave perversion of the intention of the owner to infer from his offered reward, an agreement on his part that he was to be kept out of

the possession of his property till all the delays of litigation were exhausted. To the bailee * * * such a lien would rarely be valuable, except as a means of oppression and exaction, and therefore the law will never infer its existence, either from the agreement of the parties or in furtherance of public convenience or policy."

H. BUDD, JR.

Supreme Court of Minnesota.

MARY GREVE ET AL. v. THE FIRST DIVISION OF THE ST. PAUL AND PACIFIC RAILROAD COMPANY.

Where a railroad company enters upon land and lays its track thereon before making compensation to the owner, the latter is not entitled to have the damages estimated by the value of the land, including the road-bed, ties, &c.

Although the railroad was a trespasser, and any accretions to the soil made by a trespasser becomes the property of the owner of the soil, yet in a proceeding to assess damages in such a case the proper measure is only whatever will give just compensation for the land taken.

APPEAL from District Court, county of Ramsey.

John E. Brisbin and *W. P. Warner*, for appellants.

Geo. L. & C. E. Otis, for respondents.

The opinion of the court was delivered by

GILFILLAN, C. J.—It appears that, prior to instituting any proceedings to ascertain and pay the compensation to be paid for taking the land in controversy, the respondent, the railroad company, constructed and was operating its road across such land. It instituted such proceedings in 1870, and in those proceedings the question arises, is the owner entitled to have the amount which the company must pay for the right of way estimated upon the basis of the value of the land, including the road-bed, ties, rails, &c., laid on it by the company, or of the value of the land without these improvements?

The question is new in this court. The cases in this court, referred to by the appellant, have very little bearing upon it. *Gray v. First Division St. P. & P. Railroad Company*, 13 Minn. 315, and *Hursh v. Same*, 17 Id. 439, and *Warren v. Same*, 21 Id. 424, hold that until compensation is made to the owner, a railroad com

pany has no right to take possession of land and construct its road on it; and the cases of *Hursh* and *Warren* hold that, in the case of this company, the time of filing the report by the commissioners is the time which is to be taken for the purpose of fixing the compensation.

In *Brisbine v. The St. Paul & Sioux City Railroad Co.*, 23 Minn. 114, Brisbine was a riparian owner on the Mississippi river. The City of St. Paul for a street, and the railroad company for its track, had filled in front of his lot, into the river, raising the bed of the river above the surface of the water, and on this raised land the company had laid its track. The company contended here that Brisbine was not entitled to any compensation for this raised land. The court held that he was.

The proposition that the value which the city or company had added to the land by raising it, should be excluded in estimating the compensation, was not made by nor passed upon by this court.

In this case the company having entered upon the land without making compensation, and, so far as the case shows, without the consent of the owner, was (technically, at least), a trespasser, and I have no doubt that where a trespasser affixes anything to the soil it becomes, in strict law, a part of the soil, and belongs to the owner of it; and if the value of the land, taken at the time when taken, is to be the sole measure of compensation for the taking, this would be conclusive of the appellant's right to have the value of these ties, rails, &c., included. But while the value of the land taken is very important, and in many cases the controlling element, it is not, as has been frequently held by this court, the sole consideration in arriving at the amount of compensation. Thus, in *Winona & St. Peter Railroad Co. v. Denman*, 10 Minn. 267, it was held that where the land taken was part of a larger parcel used as a farm, the commissioners were not confined to the damages done to, or the value of, the land actually taken, but might inquire into the effect of the taking upon the whole tract; and also, that the expense to the owner of fencing, rendered necessary by the construction of the road, is a proper element of damage.

In *Winona & St. Peter Railroad Co. v. Waldron*, 11 Minn. 515, it was held that in a like case special benefits to the part not taken were to be deducted from the damages caused by the taking of the part taken. In *Colwill v. St. Paul & Chicago Railroad Co.*, 19

Minn. 283, increased exposure to fire of buildings on the land not taken was held to be a proper element of damages. In *Scott v. St. Paul & Ch. Railroad Co.*, 21 Minn. 322, the charter provided that, on appeal from the award of commissioners, the jury should assess the "value" of the land taken, and the court construed the word "value" to embrace not merely the value of the land taken as a separate parcel, but also such additional value as attached to it by reason of its connection with adjacent land of the same owner; and in *Warren v. First Division St. Paul & Pacific Railroad Co.*, 21 Minn. 424, it was held that where the jury assess the damages as of the date of the award of the commissioners, interest should be allowed on the amount of the verdict from the date of the award of the entry of judgment, except where the owner has, between the award and verdict, had the actual possession and use, and derived benefit and value therefrom, in which case such value should be deducted from the interest. All these cases proceed on the ground that the value of the land taken is not in all cases to be the measure of compensation, but that when necessary to make the compensation just, fair and equitable, as the constitution, sect. 13, art. 1, sect. 4, art. 10 requires, the compensation allowed may be more or may be less than such value. This reduces the inquiry in this case to the point, does just compensation require that the appellant should be allowed the value which the company has added to the land by laying its track upon it?

That, in an action of ejectment, she might recover the track with the land, does not dispose of the question, for in such action the parties would rest on the technical rule as to what constitutes the realty, and she would recover the whole or none. The sole question, in such case would be, what belongs strictly to the realty? The question of what the company ought in justice to pay for taking the land for public use, could not enter into nor affect the case.

It was conceded on the argument that the company took possession of the land some years before proceedings to obtain the right of way were commenced, and constructed its road over it and has been operating the road ever since. When the proceedings were commenced does not appear, but it is not questioned on the argument that in taking possession of, and constructing its road over the land, it intended to make this a part of its general line, and ultimately to secure, in the manner prescribed by law, the right to retain the land for that purpose, and the company was operating

under a charter which in terms authorized it to enter upon, and construct and operate its road over, the land in advance of making the compensation required by the constitution; although, notwithstanding this, the company was, under the decisions of this court upon the constitutionality of this part of the charter, a trespasser in constructing its road over the land without first making just compensation. We think these facts ought to be considered when the question between the company and the owner is what is just compensation to be made by the former to the latter for the taking.

When we are not bound down by any technical rules of property, but may enter into the consideration of what, under the circumstances, is just and equitable between the parties, we can see no reason for allowing the appellant the value of the road-bed, ties and rails, which the respondent has placed upon the road. The court below was right in excluding such value, and the order denying a new trial is affirmed.

BERRY, J., concurring.—I agree to the general conclusion arrived at by the majority of the court in this case, viz. : That the appellant is not entitled to recover for the road-bed, ties and rails; but I dissent from the reasoning by which that conclusion is reached. I think that, with some modification, the reasons given for an analogous conclusion by the Supreme Court of Pennsylvania, in *Justice v. The Nesquehoning Valley Railroad Co.*, 6 Norris 28, are much more sound and satisfactory.

The precise question involved in the principal case seems to have been raised but rarely in the courts, and it is only within the last few years at all. Certain it is that the explanation of this is not to be found in a want of opportunity. Instances have been numerous, in the West, at least, in which railroad corporations have taken possession of land and constructed their roads over the same, without purchase and before any condemnation of the realty has taken place. In that part of the country vast tracts of land lie unoccupied, the owners often residing in distant states, and in ignorance of what is being done on or about their land. Railroad corporations have consequently found it con-

venient to build their lines of railway in disregard of the rights of the owners of the soil. As the country becomes settled, and the land increases in value the owners of property which has thus been confiscated, institute actions against the corporations, and it then becomes important to know whether they are entitled, upon a final condemnation of the realty, to recover for the value of improvements thus placed upon their land without their knowledge or assent. The explanation of the fact that this question has been hitherto so seldom raised, may possibly be that the profession has heretofore regarded the case as governed by that principle of elementary law which gives to the owner of the free-

hold all annexations made by a stranger and not under color of title. In view of the conclusion reached in the principal case, a farther examination of some of the principles which that case suggests may prove of general interest.

I. The Constitution of the United States provides that no person shall be deprived of life, liberty, or property, without due process of law, and that private property shall not be taken for public use without just compensation. Amendments to the Constitution, Art. V. These constitutional provisions for the protection of private property, are limitations of the power of the national government only, and are in no wise a restriction upon the state governments: *Barron v. Baltimore*, 7 Peters 243; *Withers v. Buckley*, 20 How. 84; *Pumpelly v. Green Bay Co.*, 13 Wall. 166-176; *Concord Railroad Co. v. Greely*, 17 N. H. 47; *Orr v. Quimby*, 54 N. H. 590; 599, 606; *Murphy v. The People*, 2 Cowen 815-818; *Woodfolk v. The Nashville, &c., Railroad Co.*, 2 Swan 422-431; *Johnston v. Rankin*, 70 N. C. 550; *Cairo, &c., Railroad Co. v. Turner*, 31 Ark. 494. However, since the adoption of the Fourteenth Amendment, providing that no state shall deprive any person of life, liberty or property, without due process of law, the courts would undoubtedly hold any act authorizing private property to be taken for public use without just compensation, to be void, as in contravention of the Constitution of the United States.

At one time it seems to have been questioned whether the federal government could exercise the right of eminent domain within the jurisdiction of the states, and the practice was quite general for the states to condemn property for the uses of the national government. The state courts argued that the provision contained in the state constitutions for taking property for a public use embraced the uses of the national government as well as those

of the state government, since those uses were public also: *Reddall v. Bryan*, 14 Md. 444. The fact was lost sight of that the word *public*, in this connection meant *pertaining to the same government*. Since the very able and satisfactory opinion pronounced by Mr. Justice COOLEY, in *Trombley v. Humphrey*, 23 Mich. 471, followed in *Kohl v. United States*, 1 Otto 367, it is now regarded as settled that the national government possesses the right of eminent domain, and that for the uses of that government condemnation proceedings should be carried on under its authority, and not under that of the states.

II. It is now regarded as established beyond controversy that independent of any constitutional provision on the subject, a state cannot take private property for public use without just compensation: *Gardner v. Newburg*, 2 Johns. Ch. 162; *Sinnickson v. Johnson*, 2 Harr. 145; *Young v. McKenzie*, 3 Kelly (Ga.) 31; *Perham v. The Justices*, 9 Ga. 341; *The State v. Glen*, 7 Jones L. 321; *Johnston v. Rankin*, 70 N. C. 550; *Piscataqua Bridge Co. v. The New Hampshire Bridge Co.*, 7 N. H. 66; *Petition of Mt. Washington Railroad Co.*, 35 N. H. 134, 141, 142. The constitutional provisions requiring compensation to be made in such cases, did not change the common law, but were adopted in order to place "the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them." *Pumpelly v. Green Bay Co.*, 13 Wall. 177.

New Hampshire and North Carolina are the only states whose constitution does not contain an express provision for compensation to the owners of private property taken for a public use.

III. If private property cannot be taken for a public use without just compensation, it is important to know at what time the owner of the property

taken is entitled to receive his compensation. In the large majority of the states, the constitutional provisions are silent as to the time when this must be done. But the courts in construing these provisions have held that compensation must be *first* made or secured. And this may be regarded as established beyond all question: *Doe v. Georgia Railroad Co.*, 1 Ga. 524; *Young v. McKenzie*, 3 Kelly (Ga.) 524; *Bloodgood v. Mohawk, &c., Railroad Co.*, 18 Wend. 9; *Cushman v. Smith*, 34 Me. 247; *Powers v. Bears*, 12 Wis. 213, 222; *Brock v. Hishen*, 40 Wis. 681; *Davis v. San Lorenzo Railroad Co.*, 47 Cal. 517; *McAulay v. Western Vermont, &c., Railroad Co.*, 33 Vt. 321; *Hall v. The People*, 57 Ill. 307, 316; *Gray v. First Division of St. Paul, &c., Railroad Co.*, 13 Minn. 315, 322. This is in conformity with the rule in all ordinary cases, that where no provision is made for credit, the vendor is entitled to the purchase-money concurrently with the delivery of the property, and is not bound to make the delivery until he has received the payment.

The only exception to the rule that the owner is entitled to have his compensation *first* paid or secured upon a definite fund, is that made in favor of a taking by the state itself, or by a county or a town. It is said to be presumed in favor of municipalities that they are always responsible, and that their property is a fund to which the owner can resort without risk of loss. *Chapman v. Gates*, 54 N. Y. 132; *Loweree v. Newark*, 38 N. J. L. 151; *McClinton v. Pittsburgh, &c., Railroad Co.*, 66 Penn. St. 404; *Ash v. Cummings*, 50 N. H. 591, 621. It is, however, essential that the law authorizing the property to be taken should contain a provision for compensation, it otherwise being void. See the cases cited above, and also *McAuley v. Weller*, 12 Cal. 500. The act will be valid, however, if a subsequent act is passed curing

the defect: *McAuley v. Weller*, 12 Cal. 500; *Bonaparte v. Camden, &c., Railroad Co.*, 1 Baldw. 205.

This distinction between a taking by the state and by an individual person or a corporation, is repudiated by Mr. Justice DOB, in his very able dissenting opinion in *Orr v. Quimby*, 5 N. H. 651, and Mr. Chief Justice REDFIELD, in an article in 15 Am. Law. Reg. (N. S.) 199, takes a similar view of the matter.

In times of war or impending public danger, it sometimes becomes imperatively necessary that private property should be first appropriated, and provision made for compensation afterwards. And it seems that under such circumstances the property may be first taken: *Mitchell v. Harmony*, 13 How. 115, 134; *United States v. Russell*, 13 Wall. 623.

IV. Inasmuch as private property cannot be taken until compensation has been first made or secured, it follows that an entry made without payment or waiver of payment, and which is not for the purpose of a preliminary survey with a view to determine the exact property to be taken, is unlawful and a trespass: *Brown v. Powell*, 25 Penn. St. 229; *Johnson v. Alamada County*, 14 Cal. 106. And the court will grant an injunction restraining from such an entry: *Bonaparte v. Camden, &c., Railroad Co.*, 1 Baldw. 205, 226; *Jersey City, &c., Railroad Co., v. Jersey City, &c., Railroad Co.*, 20 N. J. Eq. 60; *Stacy v. Vermont, &c., Railroad Co.*, 27 Vt. 14. If, however, the entry has been consummated, the owner is entitled to recover possession in an action of ejectment: *Doe v. Georgia Railroad Co.*, 1 Ga. 524; *Weisbrod v. Chicago, &c., Railroad Co.*, 21 Wis. 602; *McClinton v. Pittsburgh, &c., Railroad Co.*, 66 Penn. St. 404; *Wager v. Troy Union Railroad Co.*, 25 N. Y. 526. The owner, thus kept out of possession, is also entitled to recover his damages from the trespasser: *Mayor*

v. *Perkins*, 30 Ga. 154; *Hall v. Pickering*, 40 Me. 548; *Loop v. Chamberlain*, 20 Wis. 135; *Harrisburg v. Cran- gley*, 3 W. & S. 464.

V. In ascertaining the compensation to be paid to the owner, the value of the property must be estimated as of the time when condemnation proceedings are instituted, in distinction from the time when the public unlawfully entered and took possession: *Sherwood v. St. Paul, &c., Railroad Co.*, 21 Minn. 122; *San Francisco, &c., Railroad Co., v. Mahoney*, 29 Cal. 112; *Cook v. The Commissioners*, 66 Ill. 115; *Virginia, &c., Railroad Co., v. Lovejoy*, 8 Nev. 100; *Stafford v. Providence*, 10 R. I. 567. In this last case, it became necessary, after the first taking, to take additional land to complete the improvement undertaken by the city. The improvement already made had considerably enhanced the adjacent property, and it was urged that the value of the property to be taken should be estimated at its value at the time the improvement was commenced. The court, however, thought otherwise, and recovery was had for the value at the time of the subsequent taking.

VI. At common law, the rule unquestionably is, that annexations of chattels to another's realty, made without the assent of the landowner, become a part of such realty, and are the property of the owner of the freehold: *Britton's Pleas of the Crown*, ch. 33; *First Parish, &c., v. Jones*, 8 Cush. 184; *Poor v. Oakman*, 104 Mass. 309, 317; *Webster v. Potter*, 105 Mass. 414, 416; *Cress v. Jack*, 3 Watts 239; *West v. Stewart*, 7 Penn. St. 122. Not only is the person making the annexation wholly unable to remove the thing annexed, or to claim compensation therefor, but, as is said in *Frear v. Hardenburgh*, 5 Johns. R. 272, 278, the owner of the freehold is not under even the slightest moral obligation to remunerate him for the same.

The only exception to this rule is that made in favor of one who has gone on and made improvements under color of title. And in these cases adequate provision has been made by statute in the several states, conforming the rule in law to that in equity in similar cases: *Bright v. Boyd*, 1 Story R. 478, 478, *et seq.* The civil law upon this subject was the same as the common law, in so far that a trespasser, not entering under color of title, could not recover for the value of improvements wrongfully made by him upon the realty. The maxim was: *Præterea, id quod in solo nostro ab aliquo ædificatum est, quam vis ille suo nomine ædificaverit, jure naturali nostrum fit, quia superficies solo cedit.* Gaius Comm. Lib. 11 § 73; *Bonney v. Foss*, 62 Me. 251.

When the property of one is carried without any fault of his upon the realty of another, the owner of the freehold is not considered as having obtained any title to the property, as against the original owner. Thus, in case property carried off by a flood, and stranded on the premises of another, the owner can follow it, enter, and take it from the premises, or if the owner of the realty convert it, can recover its value: *Foster v. Bridge Co.*, 16 Penn. St. 393; *Etter v. Edwards*, 4 Watts 63.

VII. We come now to consider more especially the important question involved in the principal case, the right of the owner, at the time of the condemnation of the realty, to recover compensation for the improvements unlawfully made upon it by the railroad company. The correctness of the general principles we have above considered, is not denied in the principal case. The court simply claims that it is not restricted to an inquiry into the mere value of the realty taken, but may inquire what is a just compensation as between the parties, and it concludes that it is not essential to a "just compensation" that the owner of the

freehold should be compensated for the rails, ties, &c., which have cost him nothing. The learned Chief Justice relying upon the correctness of the conclusion reached, apparently deemed it unnecessary to fortify it by any citation of authorities. The same question, however, has been similarly decided in two other states. In *Lyon v. Green Bay, &c., Railroad Co.*, 42 Wis. 543, the Supreme Court of Wisconsin said that "it would be unjust to compel the company to pay the owner for structures placed upon the land by the company at its own expense, and in view of a subsequent condemnation of the land to its use," thereby reaching the same conclusion as in the principal case. And in *Justice v. Nesquehoning Valley Railroad Co.* 6 Norris 28, the Supreme Court of Pennsylvania reached a conclusion similar to the above, but upon different, though, as it seems to us, no more satisfactory grounds. The court there said: "There was no intent to hold adversely as a trespasser, nor to improve the ground, or to make it useful and valuable by the erection. The rails and ties were not intended to be attached to the freehold, but were laid down as part of an easement under a franchise of the state. There was no intent to use the land as an owner would, and no intent to abandon the materials to the use of the owner, but they were subject to a legal proceeding, resulting in maintaining both ownership and use for the charter purposes. We think, therefore, the ownership of the rails, ties, &c., did not vest in the plaintiff in error by the mere trespass in the original entry." The Supreme Court of California, in *California Railroad Co. v. Armstrong*, 46 Cal. 85 (1873), reached a conclusion in harmony with those above referred to, and for reasons similar to those expressed in the Wisconsin case. It cannot, however, be considered as an authority in favor of the principal case, as

it was subsequently in effect overruled in *United States v. A Tract of Land in Monterey Co.*, 47 Cal. 515. The distinction which the Chief Justice who pronounced the decision in the latter case, sought to draw between it and the former case, certainly was a distinction without a difference, and Mr. Justice RHODES, in concurring in the conclusion reached, did so because he was "of the opinion that the doctrine on which it was based was opposed to and overthrew the doctrine" of the former case.

While there is, then, authority sustaining the principal case, there is also authority flatly contradicting it. In addition to the case of *The United States v. A Tract of Land, &c.*, *supra*, there are also the cases of *Graham v. Connersville, &c., Railroad Co.*, 36 Ind. 463, and *Matter of Long Island Railroad Co.*, 6 N. Y. Sup. Ct. 298, which are to the same effect. Mr. Mills, in his excellent treatise on eminent domain, also cites to the same point, *Hibbs v. Chicago Railroad Co.*, 39 Iowa 340. The opinion pronounced in that case fails to reach the question at issue, and its citation in that connection is undoubtedly accidental, so that the authorities which have expressly passed upon this subject, now appear to be evenly balanced.

The reasoning in the Pennsylvania case seems unsatisfactory and erroneous. We can see no principle of law which sanctions the theory there advanced, that the ownership of the rails, ties, &c., remained in the railroad company. Had the company owned the realty, and then laid the track thereon, we suppose no one would question that the track had ceased to be a chattel and had become a part of the realty. It would be a fixture and would pass between vendor and vendee as such. (1.) It is actually annexed to the realty, or to the ties imbedded in the realty and appurtenant thereto. (2.) It is applicable to the use to which that part of the realty to which it is annexed is to

bo devoted. (3.) It is placed there for a permanent and not a temporary purpose. The union of these three requisites make it a fixture. See *McRea v. Central National Bank of Troy*, 66 N. Y. 496. It is not annexed under color of title. It does not come upon the realty by accident, but is deliberately placed there by its owner. The fact that the trespasser is a corporation rather than a natural person, is only an additional aggravation, as it is proverbial that corporations have "neither a body to be kicked, nor a soul to be damned." The fact that the corporation has been clothed with the right of eminent domain is immaterial, as it had not seen fit to avail itself of that right at the time the annexation was made, and that is the time which fixes the character of the property. The fact that the track was put upon the realty with no intention of abandoning it to the owner of the freehold, is immaterial, as the law never inquires into that intention.

The reasoning of the principal case, and that of the Wisconsin case, cannot be regarded as any more satisfactory. The phrase a "just compensation" has had its meaning fixed by a long series of adjudications, holding it to mean "an equivalent for that which is taken." *Bloodgood v. Mohawk, &c., Railroad Co.*, 18 Wend. 9, 35; *Keasy v. Louisville*, 4 Dana 154, 155; *Bonaparte v. Camden, &c., Railroad Co.*, 1 Baldw. 205, 227; *Cunningham v. Campbell*, 33 Ga. 625, 635; *Winona, &c., Railroad Co. v. Denman*, 10 Minn. 267, 280; *Henry v. Dubuque, &c., Railroad Co.*, 2 Iowa 283; *Virginia, &c., Railroad Co. v. Henry*, 8 Nev. 165, and this means the full and fair market value of that which is taken: *Somerville, &c., Railroad Co. v. Doughty*, 2 Zabriskie 495; *Gilsey v. Cincinnati, &c., Railroad Co.*, 4 Ohio St. 308; *Matter of Furman, &c.*, 17 Wend. 649, 670; *Matter of William, &c.*, 19 Wend. 678, 690; *Central Pacific Railroad Co. v. Pearson*, 35 Cal.

247, 261; *Brown v. Beatty*, 34 Miss. 277, 242; *East Pennsylvania Railroad Co. v. Hottenstine*, 47 Penn. St. 28. How this market value may have been created is not important, even though an increased value may have been caused by the very corporation which seeks to condemn: *Stafford v. Providence*, 10 R. I. 567. We assume then that it is settled:

1. That the track, ties, &c., at the time of the condemnation of the realty belonged in law and in equity to the owner of the freehold.

2. That the owner of the realty is entitled to a "just compensation," which means in law an equivalent for that which is taken.

3. That he does not receive an equivalent for that which is taken, if the rails, ties, &c., are taken from him and given to another without any compensation whatever.

Moreover, we regard the conclusion reached in the principal case as opposed to public policy, and, in a large degree, subversive of the spirit of the constitutional provisions on this subject. If this view of the law is finally to prevail, a railroad company is licensed to go upon another's realty, and without his knowledge or assent, construct its track across the same, without any danger of being compelled to pay for the track and ties upon the final condemnation of the realty. The result is to encourage railroad corporations in so doing. And this being so, the owner is forced either to submit to an unjustifiable wrong or to commence a lawsuit. Under the constitutional provision that "private property shall not be taken for public use without just compensation," it was never intended to drive the owner into a lawsuit, nor to encourage any policy which would result in that: *Piscataqua Bridge Co., v. New Hampshire Bridge Co.*, 7 N. H. 35, 70; *San Francisco v. Scott*, 4 Cal. 114; *Orr v. Quimby*, 54 N. H. 590, 642.

In this last case it is said: "Legal proceedings may be necessary, and he (the owner), may be entitled to notice if he can be found; but so far as such proceedings are necessary for his enjoyment of his constitutional right, they are to be instituted and carried on by the public, because the public power is limited by his reserved right. His property is taken without payment, if it is taken with the payment of a sum procurable only by his unremunerated outlay of an equal or greater amount."

VIII. It is not necessary to consider at length those cases in which the improvements were made before compensation, but with the knowledge or assent of the owner of the realty. In such cases there is no doubt that he will not be permitted to recover for the value of improvements made under such circumstances: *Emerson v. Western Railroad Co.*, 75 Ill. 176.

HENRY WADE ROGERS.

Minneapolis.

Supreme Court of Wisconsin.

EUGENES. JOSLYN ET AL., APPELLANTS, v. CORNELIUS McCABE,
RESPONDENT.

A tenant may remove fixtures while he remains in possession, but if he surrenders possession at the termination of his term without removing the fixtures and without reserving the right to remove them by agreement with the landlord, he abandons all right in them. The title to the fixtures would then accrue to the landlord as part of his realty.

Where before the surrender of possession the tenant asked the landlord, if he might leave the fixtures in the demised premises (a store), to which the landlord replied that he was willing, as the fixtures might help him to rent the store: *Held*, that this was simply a permission to leave the fixtures behind, and did not imply a license to re-enter and remove them after surrender of possession.

APPEAL from the County Court of Winnebago county.

Geo. W. Burnell, for appellants.

Hooper & Buxton, for respondent.

The opinion of the court was delivered by

RYAN, C. J.—There is no doubt that the appellants might have removed the fixtures while they remained in possession of the store; neither is there any doubt that if they surrendered possession without removing the fixtures and without reserving their right to remove them by agreement with the respondent, they abandoned all right in them. The title to the fixtures would then accrue to the respondent as part of his realty: *Keogh v. Daniel*, 12 Wis. 161. A very comprehensive and interesting discussion of these questions will be found in *Torrey v. Burnett*, 9 Vroom 457, cited by the learned counsel of the appellants.

The case comes here, without bill of exceptions, upon the findings of the court below. And the only question is whether the judgment is sustained by the facts found. The learned judge of the court below finds in effect that the fixtures were not moved when the appellants surrendered possession after the termination of their term. He further finds that the respondent did not agree with the appellants to permit the fixtures to be removed after the termination of the lease. These findings of themselves, would be fatal to the right of the appellants. But the learned judge still further finds that, before surrender of possession, the appellants asked the respondent if they might leave the fixtures in the store, and that the respondent replied that he was willing they should, as the fixtures might help him to rent the store. It is understood that this finding of evidence was to avoid the necessity of a bill of exceptions.

The learned counsel for the appellants contends that the conversation between the parties implies a license to re-enter and remove the fixtures after surrender of possession. The court cannot so hold. It was a permission to leave behind, not to re-enter and remove. The understandings of the parties here is essentially different from that in *Torrey v. Burnett*, *supra*, where the landlord, before surrender, agreed to sell the fixture for the tenant after surrender. This expressly recognised the right of property in the tenant after surrender. It was held to imply a right of re-entry to remove. This court would hesitate to hold so. But here is no express recognition of a right of property in the appellants after surrender. The question and the answer found are both ambiguous. The question will well bear the construction of being founded on the convenience of the appellants—to leave the fixtures behind, to save the trouble and expense of removing them. And the answer may well imply that understanding of the question. For it is difficult to understand how the fixtures could aid the respondent in renting his store, if they were removable at the pleasure of the appellants. The answer is a mere assent to the fixtures being left, apparently for the benefit of the respondent. It would be most dangerous to imply a right to enter upon realty and sever things attached to it, upon such vague and ambiguous language.

This view of the case renders it unnecessary to pass upon the interesting question, ably discussed in the briefs of counsel, whether, if the right to remove had remained in the appellants,

they could exercise the right and sever the fixtures by replevin. As the execution of the writ, however, effectually converted the fixtures into personalty, there is no difficulty in upholding the judgment for return.

The judgment of the court below is affirmed.

The nature of the tenant's right to remove his fixtures has been explained in two ways: by supposing that the chattel nature of the thing annexed is preserved after its annexation, or by considering that the thing ceases to be a chattel by being annexed to the land, and becomes real property, but reducible again to the condition of a chattel by separation from the realty. There is some confusion and looseness of expression among the authorities on this subject, occasioned probably by the fact that in some relations and for some purposes, as in favor of the creditors, or the executors of a tenant, the chattel nature of the thing is not entirely lost by its annexation. For many, if not most purposes, however, during the continuance of the annexation, the thing is treated as a parcel of the realty; and though it is in the power of the party making the annexation to reduce the thing again to the state of goods and chattels by severance, yet until so severed, it remains a part of the realty. See, generally, *Lee v. Risdon*, 7 Taunt. 191; *Hallen v. Runder*, 1 Cr. M. & R. 275; *Mackintosh v. Trotter*, 3 M. & W. 184; *Minshall v. Lloyd*, 2 Id. 450; *Dumergue v. Ramsey*, 2 H. & C. 790; *Holland v. Hodgson*, L. R. 7 C. P. 336; *Boyd v. Shorrock*, L. R. 5 Eq. 78; *Barnett v. Lucas*, 5 Ir. Com. Law 140; *Lee v. Gaskell*, 45 L. J. (Q. B. D.) 540; *Bliss v. Whitney*, 9 Allen 114; *Raddin v. Arnold*, 116 Mass. 270; *Guthrie v. Jones*, 108 Mass. 191; *Preston v. Briggs*, 16 Vt. 129; *Prescott v. Wells*, 3 Nev. 82; *Ewell on Fixtures* 77. The same rule seems to apply to trade fixtures as well as to other fixtures. See the authorities above cited. See, however,

Ex parte Gorely, 10 Jurist (N. S.) 1085; 34 L. J. (N. S.) Bank. 1.

In *Minshall v. Lloyd*, *supra*, PARKE, B., speaking upon this point, said: "The principle of law is that '*quicquid solo plantatur solo cedit*,' the right of a tenant is only to remove during his term the fixtures he may have put up, and so to make them cease to be any longer fixtures. That right of the tenant enables the sheriff to take them under a writ for the benefit of the tenants' creditors," and this statement of the law seems entirely accurate. Thus, it is settled by the weight of authority, that so long as they continue annexed to the realty the value of fixtures is not recoverable in trover: *Mackintosh v. Trotter*, 3 M. & W. 184; *Roffey v. Henderson*, 17 Q. B. 574; *Colegrove v. Dias Santos*, 2 B. & C. 76; *Longstaff v. Meago*, 2 Ad. & E. 167; *Pierce v. Goddard*, 22 Pick. 559; *Raddin v. Arnold*, 116 Mass. 270; *Guthrie v. Jones*, 108 Mass. 191; *Prescott v. Wells*, 3 Nev. 82; *Overton v. Williston*, 31 Penn. St. 155. There are, however, some cases concerning tenants' fixtures recoverable as against the landlord, where a different opinion has prevailed. See *Moore v. Wood*, 12 Abb. Pr. 393; *Villar v. Mason*, 25 Wis. 327; *Miller v. Baker*, 1 Met. 27; *Peck v. Knox*, 1 Sweeny 311; *Finney v. Watkins*, 13 Mo. 291.

So, the price of fixtures to a house sold while annexed, cannot be recovered under a declaration for goods sold and delivered, they being, while annexed, a part of the freehold: *Lee v. Risden*, 7 Taunt. 188; *Nutt v. Buller*, 5 Esp. 176.

It is well settled, likewise that fixtures, while annexed, are not goods and

chattels within the meaning of the English bankrupt acts: *Ryall v. Rolle*, 1 Atk. 165; *Calwick v. Swindell*, Law Rep. 3 Eq. 249; *Ex parte Belcher*, 2 Mont. & Ayr. 160; *Clark v. Crossshaw*, 3 B. & Ad. 804; *Boydell v. McMichael*, 1 Cr., M. & R. 177; *Minshall v. Lloyd*, 2 M. & W. 450; *Ewell on Fixtures* 333 *et seq.* And the rule is the same whether the annexation is real or only constructive: *Walmsley v. Milne*, 7 C. B. (N. S.) 115; *Ex parte Astbury*, Law Rep. 4 Ch. App. 630.

As to the time when tenants' fixtures may be removed, the rule is generally stated to be that this right of a tenant for years must be exercised during the continuance of his term, and, unless the right is reserved by agreement, may not be exercised after the expiration thereof, and surrender of possession, and the rule thus stated has prevailed ever since the case in the Year Book, 20 Hen. VII., b, pl. 24, decided in the year 1504, where we find the rule stated thus: "And if a lessee for years makes such a furnace for his advantage, or a dyer makes his vats and vessels to carry on his occupation during his term, he may remove them; but if he suffers them to remain fixed to the earth after the end of his term, then they belong to the lessor." See, also, *Poole's Case*, 1 Salk. 368; *Ex parte Quincy*, 1 Atk. 477; *Dudley v. Warde*, 1 Amb. 113; *Minshall v. Lloyd*, 2 M. & W. 450; *Pugh v. Arton*, Law Rep. 8 Eq. 626; *Giffield v. Hapgood*, 17 Pick. 192; *Moore v. Smith*, 24 Ill. 512; s. c. 26 Ill. 392; *Stockwell v. Marks*, 17 Me. 455; *Davis v. Buffum*, 51 Me. 160; *Dingley v. Buffum*, 57 Me. 381; *Hoffner v. Lewis*, 73 Penn. St. 302; *Davis v. Moss*, 38 Penn. St. 346; *Overton v. Williston*, 31 Penn. St. 155; *Preston v. Briggs*, 15 Vt. 129; *Dostal v. McCaddon*, 35 Iowa 318; *Beckworth v. Boyce*, 9 Mo. 556; *State v. Elliott*, 11 N. H. 540; *Brooks v. Galster*, 51 Barb. 196; *Allen v. Kennedy*, 40 Ind. 142. Per-

haps the rule might more accurately be stated to be that the right of the tenant to remove his fixtures must, in the absence of an agreement extending the time of removal, be exercised either during the term as fixed by the contract, or during such further period as the tenant may lawfully and rightfully remain in the possession of the demised premises: *Weston v. Woodcock*, 7 M. & W. 14; *London Loan & Discount Co. v. Drake*, 6 C. B. (N. S.) 810; *Merritt v. Judd*, 14 Cal. 59; *Thomas v. Crout*, 5 Bush 40; *Cromie v. Hoover*, 40 Ind. 49; *Allen v. Kennedy*, Id. 142. The true ground of this rule seems to be that the tenant's fixtures by their annexation become a part of the freehold, subject to the tenant's right during his term to remove them and make them again chattels, and that unless so removed they belong to the landlord as a part of the realty. See *Gibson v. Hammersmith Railway Co.*, 2 Drew. & Sm. 610; *Leader v. Homewood*, 5 C. B. (N. S.) 545; and the principal case.

There are, however, certain recognised exceptions to the rule that the right of removal must be exercised during the term and before surrender of possession; as where the tenant is wrongfully prevented by the landlord from removing them during the term: See *Moore v. Wood*, 12 Abb. Pr. 393; or where he is prevented by the use of legal or equitable process, till after the expiration of the term: *Mason v. Fenn*, 13 Ill. 525; *Bircher v. Parker*, 40 Mo. 118; s. c. 43 Mo. 443; *Goodman v. Hannibal & St. Joseph Railroad Co.*, 45 Mo. 33.

It is also well settled that the right to remove fixtures may, as between landlord and tenant, be modified or extended by the agreement of the parties. See *Merritt v. Judd*, *supra*; *McCracken v. Hull*, 7 Ind. 30; *Higgins v. Riddell*, 12 Wis. 537; *Gray v. Oyler*, 2 Bush 256; *White's Appeal*, 10 Penn. St. 252; *Torry v. Burnett*, 38 N. J. Law, 457;

also, Ewell on Fixtures 66 *et seq.*; 149 *et seq.* Such an agreement may either be express or implied from the terms of some other agreement. Thus in *Torry v. Burnett*, *supra*, the landlord agreed to sell a trade fixture for the benefit of the tenant, but failed to do so, and it was held that the tenant had a reasonable time to remove the fixture, although his term had expired and possession been surrendered to the landlord.

BEASLEY, C. J., in delivering the opinion of the court in this case said: "The agreement on the part of the landlord to endeavor to effect a sale of the fixture for the benefit of the tenant, carried with it an implied permission, that it might be removed, if such endeavor proved unsuccessful. Such arrangement, of necessity, involved the fact that the tenant did not intend to abandon the fixture to the landlord, and it is quite unreasonable to suppose that such an abandonment was meant in case a sale was not effected. The engine was left on the property for a specific purpose, and with the assent of the landowner; such purpose having failed, the tenant did not lose his property, but was entitled to remove it within a reasonable time." This case seems correct, both in principle and application; the writer cannot concur in the doubt implied in the principle case by the statement 'this court would hesitate to hold so.'

As to the principal case while the principles therein laid down are clearly correct, there is some little difficulty as to their application. The right of the tenant to remove his fixtures during his term is believed, in the absence of a special agreement on the subject, to be a right which he is not bound to exercise,

but may waive, if he sees fit so to do. In other words, he has a *right* to remove them during the term, but in the absence of an agreement to that effect is under no *obligation* so to do. In this view of the case a construction of the question propounded by the tenants to the landlord, which founds it on the convenience of the appellants, to leave the fixtures behind to save the trouble and expense of removing them, when they were under no obligation to remove them and thus incur expense, seems rather forced. On the other hand it seems much more natural to suppose that, whatever may have been the intention of the landlord, the tenants intended by the question to ask permission to remove the fixtures, and had the answer of the landlord been simply that he was willing, it would seem that the decision ought to have been in favor of the tenants, for after all the question is, what was the real intention of the parties as shown by the words they have used, and in determining this question, such a construction ought to be given to the question as would not make it senseless or useless. But the reason assigned by the landlord for granting permission to leave them, does imply that he, at least, understood that they were to be left permanently and might help him rent the store. The minds of the parties then never met on the question whether the tenant might remove the fixtures, and in this view of the case, the decision seems correct, for of course the burden is with the tenant to show the alleged license to remove after the expiration of the term.

MARSHALL D. EWELL.

Chicago.

RECENT ENGLISH DECISIONS.

High Court of Justice. Court of Appeal.

BRITTAİN v. ROSSITER.

The plaintiff entered the defendant's service under a verbal contract for a year, to commence two days after the day on which the contract was made. Before the expiration of the year, the defendant dismissed him. To an action for wrongful dismissal, the defendant pleaded the Statute of Frauds. *Held*, that the verbal contract was not made absolutely void by the Statute of Frauds, s. 4, but was an existing contract, though not enforceable; no new contract could, consequently, be implied from any acts done under such an existing contract; and the principles of equity, as to part performance, in contracts relating to land, were not to be extended to contracts relating to other matters.

Carrington v. Roots, 2 M. & W. 248, and *Reade v. Lamb*, 6 Exch. 130, commented on; *Snelling v. Lord Huntingfield*, 1 C., M. & R. 20, followed.

THIS was an action for wrongful dismissal, and the defendant pleaded the Statute of Frauds.

At the trial, before HAWKINS, J., and a common jury, the plaintiff stated that he had three interviews with the defendant, on Tuesday, the 17th, Thursday, the 19th, and Saturday, the 21st of April; that the hiring was discussed at all three interviews, and that on the 21st of April it was arranged that the plaintiff should enter into the defendant's service for a year, at the rate of 170*l.* per annum for the first and 200*l.* per annum for the second half-year, and that his duties should commence on Monday, the 23d of April.

On the 23d of April, the plaintiff entered into the defendant's service, and was employed for several months; but before the expiration of a year, the defendant dismissed the plaintiff, without notice, giving him one month's salary in lieu of notice.

On this evidence, HAWKINS, J., held that the contract was complete on Saturday, April 21st, and was one not to be performed within a year, and directed a verdict for the defendant.

The Exchequer Division (KELLY, C. B., and HAWKINS, J.) refused a rule for a new trial, and the Court of Appeal (BRETT, COTTON and THESIGER, L.JJ.) refused a rule on the grounds of the contract not being within the Statute of Frauds, and that some conversation, which took place on Monday, the 23d, between the plaintiff and the defendant, amounted to a contract on that day; but granted a rule *nisi* for a new trial, on the ground that there had been a part performance of the contract, so as to take the case

out of the Statute of Frauds, and also on the ground that there was evidence of a hiring independently of the Statute of Frauds.

Lawrance, Q. C., and *Hutchins*, for the defendant, showed cause.—You cannot imply a contract when an express contract is in existence. *Snelling v. Lord Huntingfield*, 1 C., M. & R. 20, is on all fours with this case, and has been followed by *Giraud v. Richmond*, 2 C. B. 835; *Leroux v. Brown*, 12 C. B. 801; *Banks v. Crossland*, Law Rep. 10 Q. B. 97; *Appleby v. Johnson*, Law Rep. 9 C. P. 158.

Bottomley Firth, for the plaintiff, in support of the rule.—The dicta of the judges in *Carrington v. Roots*, 2 M. & W. 248, show that this contract was void absolutely, and then a new contract can be implied: *Reade v. Lamb*, 6 Exch. 130; *Inman v. Stamp*, 1 Stark. N. P. 12; *Thomas v. Williams*, 10 B. & C. 664; *Fairman v. Oakford*, 5 Hurlst. & N. 635; *Beaston v. Collyer*, 4 Bing. 309. As to part performance—*Attorney-General v. Day*, 1 Ves. Sr. 218; *Bond v. Hopkins*, 1 Sch. & Lef. 413

BRETT, L. J.—I am of opinion, after due consideration, that this rule must be discharged. It seems to me that it was proved, beyond the capability of contradiction, that there was on Saturday, April 21st, an express contract of service for a year, which year was commenced on the Monday, and that, therefore, that express contract was within the 4th section of the Statute of Frauds; that is to say, that it was a contract, but, being only verbal and not written, it was a contract upon which neither party could maintain an action so as to charge the other.

It was suggested that, inasmuch as the plaintiff did on Monday enter, and continue for some time, in the defendant's service, we must, from his so doing, imply another contract to serve for a year, which contract would be subject to the same conditions as the original contract, but would not be within the Statute of Frauds; and it was said that we can imply that contract from what was done, because the first contract was void absolutely.

In the first place, I think, on the true view of the case, that it is not right to say that the first contract is void absolutely, because it is within the 4th section of the Statute of Frauds. There is a contract, but no person can be charged upon it in a court of law. If the original contract still exists, then, it seems to me, you can-

not, from the acts done in the performance of that contract, imply a new contract. Those acts were done by the parties as a part performance of the actual, existing contract, and not with any intention of acting under another contract, and it would be drawing a wrong inference to say that from those acts you can infer that the parties intended another contract. I think that the proposition cannot be controverted, that no other contract can be implied from the acts done than the original contract, because there was the original contract, which was an express contract, in existence. All that can be said is that no action can be maintained for a breach of that express contract, for the statute prevents any one being charged on such a contract when not in writing. That is the whole effect of section 4.

Cases were cited to show the contrary, and the cases of *Carrington v. Roots* and *Reade v. Lamb* were most relied on, and it was said that there were in those cases judicial declarations that the contract was absolutely void, because it had not been reduced into writing; but it must be observed that those declarations were not necessary for the decision of the cases in which they occur. What was really decided in those cases was, it being admitted you could not charge a person directly on the contract because it was not in writing, no more could you do so indirectly, and that you could not rely on the contract in any cause of action which necessitated the admission of the validity of that contract—that is to say, of its binding force in a court of law. There were no doubt phrases used in those cases, which are relied on as saying that the contract is absolutely void, but those cases were considered in *Leroux v. Brown*, by Lord Chief Justice JERVIS and Mr. Justice MAULE, and they took the same view of this case as I have now attempted to express, and gave a clear decision (and one which was necessary for the case before them), that a contract expressly made in words, which is within the 4th section, is not void because it has not been reduced into writing, but only that it cannot be enforced, nor anything depending on it, in an English court of law.

Snelling v. Lord Huntingfield, which has never been overruled, and which is strongly, to my mind, supported by *Leroux v. Brown*, is directly in point in the present case, and seems to me to have been rightly decided.

I am of opinion, therefore, on that point, that the contract was not void absolutely, but was existing, and as it was existing, from

the acts done in performance of it, you cannot imply any other contract.

The misfortune for the plaintiff in this case is, that he was obliged to insist that he had a hiring for a year, and the only way he could prove that was by being enabled to rely on the contract into which he entered on the Saturday. He cannot rely on that in consequence of the Statute of Frauds, and so he cannot maintain an action on that view of the case.

Then it was said that, as there was part performance, we might look at the contract, notwithstanding the Statute of Frauds, and that we could do so, because we must now act on the same principles as existed in courts of equity before the Judicature Act. Now, we know that in certain cases of part performance with regard to contracts for the purchase of lands, the equity courts have looked at the evidence to see what the contract was with regard to that land, though there was no contract in writing; but the application of that principle in equity was confined to questions only upon contracts relating to lands. They did not apply the principle to such a contract as the present.

I will say no more as to the decisions in equity, with regard to contracts relating to land, than that I think they were bold decisions, having regard to the Statute of Frauds. The principle was never applied to a contract like this before the Judicature Act was passed. Can it be now, after the passing of the Judicature Act? It seems to me the right construction with regard to the application in common-law courts of the principles of equity is, that the Judicature Act gives no one any right which he had not before, either in law or equity courts, because if it does it alters the rights of people; whereas, I venture to say the Judicature Act alters no rights—it only transfers procedures. If that is a true proposition, before this act was passed no one could be charged on a contract like the present, either in equity or law; if by reason of an attempt to apply some abstract principle of equity to this case, we were to enable a person to enforce this contract, we should enable him now to do that which no one could have done before, either in law or equity.

COTTON, L. J.—I think this rule must be discharged. It was argued that, though the contract was not enforceable, because of the 4th section of the Statute of Frauds, yet that there was, under

the circumstances, an implied contract, and it was attempted to take the case out of the rule which lays down that you cannot imply a contract with reference to matters as to which there existed an express contract, by saying that the effect of the 4th section of the Statute of Frauds is to make that express contract absolutely void.

I am of opinion that that is not a fair construction of the section. The courts of equity construed the section not as making the contract void, but only as making evidence of such contracts void, and, under certain circumstances, they dispensed with anything required by the Statute of Frauds, considering that certain other matters were sufficient to justify them in looking at evidence not ordinarily allowed to be shown. *Carrington v. Roots* and *Reede v. Lamb* are both cases with *dicta* of the judges, tending to show that section 4 makes the contract void altogether, but I think there is a passage in the judgments which explains what is meant. In *Carrington v. Roots* the action was brought by a party who had purchased by a verbal contract a growing crop of grass, with liberty to go on the close wherein it grew for the purpose of cutting and carrying it away, and it was held that he could not maintain trespass against the seller for taking away the horse and cart from the close, for the action was, in substance, one charging the defendant on the contract within section 4 of the Statute of Frauds. Lord ABINGER says, "Whenever an action is brought on the assumption that the contract is good in law, that seems to me to be, in effect, an action on the contract. If the whole transaction between the parties were set forth in the declaration, the contract would form part of it, and, in effect, the plaintiff now says that the defendant ought not to take his cart, because it was lawfully there under that contract. This is a collateral and incidental mode of enforcing the contract, though it is not directly sued on." Mr. Baron PARKE says, "I think this is an averment of a binding contract for the sale of the crop, with a right to enter on the land in order to take the crop. The contract being void by the statute, the action cannot be maintained." And when he says a "void" contract, he means it is not a contract that one party could, as a matter of right, enforce against the other. In *Reade v. Lamb* the question was whether certain pleas were properly pleaded, and the judges say that for this purpose the 4th and 17th sections are the same.

I am of opinion that under the statute the verbal contract made on Saturday, April 21st, was an existing contract, but was unenforceable.

Then it was said that even if there is no implied contract, yet the original contract may, notwithstanding the Statute of Frauds, be now enforced in this court in consequence of the part performance, and that that principle can be applied now since the passing of the Judicature Act. The first thing necessary to consider as to that is, what is the doctrine of part performance? It is argued that as a rule the governing principle of the courts of equity was that they would not allow the Statute of Frauds to be made use of to defraud another; but that is not really the full principle; if it had been so, the case of a man who had received the purchase-money for lands, and refused to convey those lands, would come within the principle, but it is clear that the receipt of 20,000*l.* under a verbal contract will not, without more, enable the person who has paid that money to enforce the contract; and yet what could be more to another's fraud than that?

The real principle is this: when the equity courts found a man in possession of land where, if there was no contract, he would be a trespasser, then, taking such possession as being strong evidence of ownership of the land, they implied a contract, and said we will allow the parties to go into evidence to show what the real circumstances were under which the land was held. That being so, can that principle be applied to the present case? It is said that it can be by virtue of the Judicature Act, section 24, sub-sections 4, 7, which enables any court of common law to enforce those rights which equity expressly enforced without sending the party there. The intent and object of the act was to constitute one court, to deal with all matters in dispute between the parties, without sending them from one court to another. I agree with Lord Justice BRETT, that it was not intended by the Judicature Act to give any new rights to parties, but simply to enable the court to deal with all the rights that had been previously dealt with in equity. The doctrine of part performance in equity has been confined to actions relating to lands, and that being so, I think we ought not on any vague notion, to interfere on equitable principles to give to persons a right which they would not have had previously to the passing of the Judicature Act, or to apply the doctrine of part performance to

cases in which equity would not have applied it, and in which equity never interfered.

THESIGER, L. J.—There are two questions raised in this case. The first is whether the plaintiff can maintain his action at common law, and the second is, if he cannot do so, whether he can by reason of the equitable doctrine of part performance.

I feel reluctantly constrained to an opinion that he cannot in either way. I say, “reluctantly,” for it appears to me manifestly unjust, that where a contract of hiring has been acted on, and one party has had, to a great extent, the benefit of the contract, that that party can put an end to that contract at any time he thinks convenient, without giving any notice to the other party, and I should have been glad to hold here that the party who has entered upon the contract of service, and has acted upon it, at all events, at the very least, is entitled to reasonable notice before such service could be terminated.

As regards the right to maintain this action at common law, it is admitted that the contract between the parties was finally settled on the Saturday, the 21st of April: and it is not in dispute that if the contract was concluded on that day, that it was a contract within section 4 of the Statute of Frauds. The question then arises, What is the effect of that statute on such a contract? Is it, as was contended by Mr. *Firth*, that the contract would be swept away altogether, and does not, therefore, stand in the way of proof of another contract? or is it a contract still in existence, though it cannot be enforced by action on the part of the plaintiff? There is no doubt that there are expressions to be found in the cases to which our attention has been called, from which it might be inferred that several judges were of opinion that such a contract was absolutely void under section 4 of the Statute of Frauds, but I think even if the cases are looked at by themselves, it is clear that it was not necessary for the purposes of those cases to decide if the contract was absolutely void; and certainly, if you look aside from those cases to the other cases cited, it is clear that there have been distinct decisions, where the point was necessary to be decided, to the effect that a contract is not absolutely void under the 4th section, and really when one looks at the statute itself it seems impossible to hold that the contract can be absolutely void. If the words of the 4th section clearly point to no more than this, that no

action shall be brought on the contract, and that it is not absolutely void, it is clear from this that, while no action can be maintained against one of the parties to the contract, supposing he did not sign it, it may be the case, on the other hand, that another party, having signed it, may have an action brought against him. Obviously, therefore, it may be void as against one party while it is enforceable against the other.

The arguments in *Carrington v. Roots* and *Reade v. Lamb* were pointed to this, that, though there is a difference in the language of the 4th and 17th sections, yet, in reality, the result of these two sections, as regards contracts within them, is the same; but, if that be so, it by no means follows that, even under the 17th section, the contract is void for all purposes. On the other hand, I think it is clear that it is not void for all purposes, and it is a real existing contract, though not enforceable, for this reason, that the statute in the 17th section provides that part performance shall enable the contract to be enforced. *Snelling v. Lord Huntingfield*, which has never been overruled, is a distinct decision on the point we have to decide, and has been followed in several cases.

When a contract is not enforceable within the Statute of Frauds it is still an existing contract, and the result of it being an existing contract is that there can be no implied contract while that express contract is in existence; and though it may be hard on a person who has been a party to such a contract that he can in no way enforce either the express or any implied contract, yet if we follow *Snelling v. Lord Huntingfield* the law is so laid down, and we are bound by it.

The result is that, there being in the present case an express contract on Saturday, April 21st, not enforceable as within the Statute of Frauds, the plaintiff cannot maintain an action on that contract, and, on the other hand, he cannot maintain one on an implied contract.

It has been said that, though there cannot be a recovery on an executory contract where there is no memorandum to satisfy the Statute of Frauds, yet if the contract had been executed to the extent of a man going into the service, and of the other getting the benefit of that service, there can be a recovery in respect of the service so rendered; and I must confess that if the matter were *res integra*, and we were not bound by the authorities, I should have great difficulty in seeing why we should not hold that a man

could recover in respect of such service, and why we should not equally maintain the proposition that he could not be turned out of the service without a reasonable notice, such as implied by law or contemplated by the parties. But the contrary is decided in *Snelling v. Lord Huntingfield*.

Then it is said that in equity, notwithstanding the Statute of Frauds, where there has been, with reference to contracts relating to lands, an entry upon the land and a part performance of the contract in that respect, a court of equity may look to see what that act really represented—in other words, what was the contract to which that act was to be referred? I must confess I see no reason or principle why, where there has been an entry upon a service under a contract of hiring, the equity doctrine should not equally apply, and why we should not, in the same way, look to see what is referable, and (just as the principle of equity is founded on this, that, notwithstanding the statute, equity will not allow fraud on a party who has been induced to change his position), why should we not also act on that principle in a case of entry upon service. But at the same time I feel that these doctrines relating to part performance are doctrines which are not to be extended, and that we ought not, at all events, at this late period, to go beyond what the courts have distinctly decided as the principle; and though if we could clearly see that the principles which are applied with regard to contracts relating to land are to be or might be applied to cases of contracts of hiring of service, I think there is nothing in section 24 of the Judicature Act which would prevent our holding that that principle is to be applied; yet I do think that the fact of equity never having applied this principle to this kind of cases, is, at all events, sufficient to bind us to say that equity has not considered that the principle ought to be extended.

For these reasons I concur in holding that the decision of the court below was right, and ought to be affirmed.

Rule *nisi* discharged.

In America also, the weight of authority is that an oral contract to labor for more than a year is not taken out of the operation of the statute, by a mere partial performance by the person employed, so that he can recover for a wrongful dismissal before the time expires; whatever may be the effect of

part performance in contracts relating to land. And this is so, whether the statute, as is sometimes the case, expressly declares the contract "void," or merely enacts that "no action shall be brought upon it." In neither case is there any exception made by reason of part performance, as there is in the

section relating to the sale of goods, &c. The fact that such exception is made in one section of the statute, and omitted in another, is sufficient proof that it was not intended to so extend it; and, although courts of equity have allowed such effect to partial performance in contracts for the sale of real estate, yet courts of law do not incline to extend such exception to any other cases. *Comes v. Lamson*, 16 Conn. 246. See the subject examined in *Marcy v. Marcy*, 9 Allen 8. And the argument leads to the conclusion that even complete performance by the laborer, will not render the contract so far valid, that the laborer could sue upon the original contract, and recover for his labor according to the contract price: *Emery v. Smith*, 46 N. H. 151. But of course the laborer might recover upon a *quantum meruit*, where he has served the entire time; and doubtless the contract price agreed to by the employer is *admissible* against him as tending to show the value of the services; not as a contract, but as an admission. See *McGlucky v. Bitter*, 1 E. D. Smith 618; *Nones v. Homer*, 2 Hilt. 116; *Sims v. McEwen*, 27 Ala. 184; *Ray v. Young*, 13 Tex. 550. And probably if the plaintiff had fully performed his contract with the defendant's consent, and should sue on a *quantum meruit*, he could recover no more at most than the contract price; for the contract might regulate the amount or value of the services, even if the action was not specifically upon it, but only for work and labor generally: *Van Valkenburgh v. Croffert*, 7 N. Y. Weekly Dig. 164 (1877). Whether a laborer could recover anything for partial performance of such a contract, if he wilfully leaves before the time expires is not fully agreed. Some cases hold that the contract can not be set up against a plaintiff to defeat his recovery upon a

quantum meruit; because the spirit of the statute is that the contract shall not be enforced or set up in a court of justice. See *King v. Welcome*, 5 Gray 41; *Comes v. Lamson*, 16 Conn. 246; *Tague v. Hayward*, 25 Ind. 428; *Scotten v. Brown*, 4 Harring. 324; *Finch v. Finch*, 10 Ohio St. 507. Whether he could commence a suit before the expiration of the time fixed by the contract is not so clear. See *Clark v. Terry*, 25 Conn. 395.

But, perhaps, the main question is not yet fully settled, since some respectable authorities are the other way, notably the decisions in Vermont. See *Philbrook v. Belknap*, 6 Vt. 383; *Mack v. Bragg*, 30 Id. 571; where it was distinctly held that the laborer could not recover anything for partial performance, the contract being entire, and the plaintiff bound by it, though oral. But they seem to us to take too limited a view of the spirit and intention of the statute. It is true the statute merely says, that "no action shall be brought upon it," &c., and it is true in one sense, no action is brought upon it when it is merely set up to defeat another action. But does not the statute mean that no such contract shall be enforced in a court of justice, and no rights established by it? If a plaintiff sues for goods bargained and sold, could a defendant plead by way of set-off, that the plaintiff had orally agreed to labor for him for more than a year, and had not fulfilled his contract, by which he owed him more than the value of the goods? And yet he would not be bringing any action on his contract, but only defeating another's action by setting it up. This would be adhering to the letter at the expense of the spirit, and sacrificing the substance to the shadow.

EDMUND H. BENNETT.

ABSTRACTS OF RECENT DECISIONS.

ENGLISH COURTS OF COMMON LAW.¹SUPREME COURT OF ILLINOIS.²SUPREME COURT OF MISSOURI.³COURT OF ERRORS AND APPEALS OF NEW JERSEY.⁴SUPREME COURT OF OREGON.⁵SUPREME COURT OF RHODE ISLAND.⁶SUPREME COURT OF APPEALS OF WEST VIRGINIA.⁷ACCRETION. See *Riparian Owner*.

ACTION.

Assumption of Mortgage by Purchaser of Land—Statute of Frauds.
—A. made three successive mortgages of his realty to B., C., and D. He then sold this realty to E., describing the mortgages in his deed of conveyance and adding the words, "which said mortgages are hereby assumed by E., as part of the consideration of this deed." Subsequently B., the first mortgagee, sold the realty under the powers of his mortgage. D., the third mortgagee, then brought *assumpsit* against E., the purchaser from A., for the amount of A.'s mortgage-note to D.: *Held*, that E. was liable for the amount of the note: *Urquhart v. Brayton*, 12 R. I.

E.'s liability was under an implied contract, and hence not subject to the Statute of Frauds: *Id*.

E.'s liability, not arising from a sealed contract, might be enforced by *assumpsit*: *Id*.

ADMIRALTY.

Collision—Warrant to Arrest Mail Packet belonging to Foreign State—Treaty-making Power of Crown—Jurisdiction.—A packet conveying mails and carrying on commerce, does not, notwithstanding that she belongs to the sovereign of a foreign state, and is officered by officers commissioned by him, come within the category of vessels which are exempt from process of law; and it is not competent to the Crown, without the authority of Parliament, to clothe such a vessel with the immunity of a foreign ship of war, so as to deprive a British subject of his right to proceed against her: *The Parlement Belge*, L. R., 4 Prob. Div.

Salvage—Towage Contract—Counter Claim.—A tug under contract

¹ Selected from recent numbers of the Law Reports.

² From Hon. N. L. Freeman, Reporter; to appear in 89 Ills. Reports

³ From T. K. Skinker, Esq., Reporter; to appear in 68 Mo. Reports.

⁴ From G. D. W. Vroom, Esq., Reporter; to appear in vol. 12 of his reports.

⁵ Cases decided during the present term and to be reported in 7 or 8 Oregon Reports.

⁶ From Arnold Green, Esq., Reporter; to appear in 12 R. I. Reports.

⁷ From Hon. Robert White, Reporter, to appear in 14 W. Va. Reports.

to tow a ship is not entitled to salvage remuneration for rescuing the ship from danger brought about by the tug's negligent performance of her towage contract. A tug agreed to tow a ship from Liverpool round the Skerries for a fixed sum. The tug imprudently towed the ship in bad weather too near a lee shore, and the weather becoming worse during the performance of the agreed towage service, the hawser parted, and the ship was placed in a position of danger, and was compelled to let go her anchors to avoid being driven on shore. From this position she was rescued by the tug, having been compelled to slip her anchors and chains, which were lost: *Held*, that the tug was not entitled to claim salvage remuneration, and that her owners were liable to pay for the loss of the anchors and chains: *The Robert Dixon*, L. R., 4 Prob. Div.

AGENT.

Payments made to when Good.—Payments made to an agent are good and obligatory upon the principal in all cases where the agent is authorized to receive payment, either by express authority, from the usage of trade, or from the particular dealings between the parties: *Noble v. Nugent*, 89 Ills.

ASSUMPSIT. See *Action*.

ATTORNEY.

Action for Fees.—Counsel fees cannot be recovered by action, unless a contract fixing the amount can be shown: *Hopper v. Ludlum*, 12 Vroom.

BAILMENT.

Pledge.—A. endorsed a note made by W. and delivered it to W. to raise funds on. W. pledged it to P. for a debt due, which was afterwards paid. W., owing another debt to P., wrote to P., while the note formerly pledged was still in P.'s hands, that W. had arranged with his creditors for a time and wished the debt due to P. carried for a while, P. to hold as collateral as before the note endorsed by A. A. was secured for his endorsement. In an action by P. against A. the indorser: *Held*, that the letter of W. to P. implied an actual pledge, and was not a mere offer to pledge. *Held*, further, that P. could recover: *Providence Thread Co. v. Aldrich*, 12 R. I.

BILLS AND NOTES. See *Partnership*.

CHATTEL MORTGAGE. See *Debtor and Creditor*.

COLLISION. See *Admiralty*.

CONSTITUTIONAL LAW.

Drainage of Low Lands—Ancient Usage.—The legislative right to order low lands to be drained, at the expense of the owners, rests entirely on ancient custom, and cannot be deduced from the power to legislate, unless in the particular case, the lands are so situated or conditioned as to make their reclamation a matter of direct public concern: *Hoagland v. Wurts*, 12 Vroom.

In this state ancient usage sanctions legislation that provides for the drainage of low lands at the expense of the owners. But such legisla-

tion, to be valid, must conform to the usage upon which the right to legislate is founded: *Id.*

A law authorized the cost of a drainage scheme to be estimated, and such estimated expense to be allotted to the landowner in proportion fixed by the mere judgment of the appraisers, in advance of the doing of the work. *Held*, that such a method was a departure from the old usage, and was illegal: *Id.*

CONTRACT. See *Sale*.

Entire or Divisible.—A contract to cut and deliver at the boom of appellant's mill, one million feet of good, sound merchantable logs within the year, at \$4.25 per thousand feet, to be scaled and received as each one hundred thousand feet are put in floating water of the creek, held to be a severable and not an entire contract: *Tenny et al. v. Mulvaney et al.*, S. C., Oregon.

Parties Contracting by Letter.—The defendant applied for shares in the plaintiffs' company. The company allotted the shares to the defendant, and duly addressed to him and posted a letter containing the notice of allotment, but the letter never was received by him. *Held*, by BAGGALLAY and THESIGER, L.JJ., BRAMWELL, L. J., dissenting, that the defendant was a shareholder: *British and American Telegraph Co. v. Colson*, Law Rep., 6 Ex. 18, overruled: *Household Fire Ins. Co. v. Grant*, Law Rep. 4 Exch. Div.

CORPORATION. See *Criminal Law*.

Estoppel.—Stockholders who subscribe and organize a corporation under a charter, and reap the benefits of the law, and thereby induce persons to credit the corporation, or make deposits on the faith of its being legally organized, and of the individual liability of its members, will be estopped from alleging that the charter is unconstitutional as a means of avoiding their personal liability as fixed by such charter: *McCarthy v. Lavasche*, 89 Ills.

CRIMINAL LAW. See *Verdict*.

Libel—Indictment.—Whether matter published is obscene or not is a question of law and not of fact, and an indictment for printing, having in possession and giving away an obscene and indecent pamphlet, must set out the supposed obscene matter, unless the publication is in the hands of the defendant, or out of the power of the prosecution, or the matter is too gross and obscene to be spread on the records of the court, either of which facts, if existing, should be averred as an excuse for failing to set out the obscene matters: *McNair v. The People*, 89 Ills.

Corporation—Indictment of.—A corporation may be indicted for "Sabbath breaking" under the 16th and 17th sections of chapter 149 of the Code of W. Va.: *State v. B. & O. Railroad Co.*, 14 W. Va.

Murder.—Section 1, p. 445 Wagner's Statutes, provides that every murder * * * which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed murder in the first degree. *Held*, that the words "other felony" here refer to some felony collateral to the homicide, and not to those acts of personal violence to the deceased which are necessary and

constituent elements of the homicide itself. They are merged in it, and do not, when consummated, constitute an offence distinct from the homicide. Section 33 p. 450, Wag. Stat., makes them a felony only when death does not ensue. Hence, where a homicide results from blows given wilfully and maliciously, and with intent to inflict great bodily harm, but without the intent to kill, it does not constitute murder in the first degree. NORTON, J., and SHERWOOD, C. J., dissenting: *State v. Shock*, 68 Mo.

DAMAGES.

Liquidated by the Parties in Advance.—Where in a written contract to cut a certain number of cords of wood by a given time, it was stipulated in the contract that in case the wood was not all cut by the time named in the contract, the laborer should forfeit five cents per cord on what wood he had cut. *Held*, that such stipulation fixes the measure of damages to be paid by the party failing to cut the wood: *Lung Louis v. Brown*, S. C., Oregon.

DEBTOR AND CREDITOR.

Taking Separate Obligation for Joint Debt.—Where there is an express agreement between the creditor and a partnership or a joint debtor, whereby the creditor agrees to take and accepts the individual note or obligation of the partner or joint debtor in discharge of the partnership or joint debt, such agreement is founded upon a valid consideration, and will have the effect to discharge the partnership or joint debt: *Bowyer v. Martin*, 14 W. Va.

Such an agreement and acceptance would be equally binding if it were to take the individual obligations or notes of each partner or joint debtor, each for his portion of the joint or partnership debt, and would release the individuals from the joint or partnership debt: *Id.*

Mortgage of Chattels—Possession and Power of Sale remaining in Mortgagor.—Where it appears either on the face of the mortgage or by parol evidence that the mortgagee of personal property has given to the mortgagor an unlimited power to dispose of the property mortgaged for the use of the mortgagor, and the property remains in the hands of the mortgagor, the mortgage is void as to purchasers and attaching creditors of the mortgagor: *Orton v. Orton*, S. C., Oregon.

DRAINAGE. See *Constitutional Law*.

EMINENT DOMAIN.

Choice by Public—Mine.—When lands are sought to be taken for a public use, the public authorities, in the absence of any statutory provision to the contrary, have a reasonable time given them, after the ascertainment of the expense of the scheme, to decide whether to accept or refuse the land at the price fixed: *O'Neill v. Freeholders of the County of Hudson*, 12 Vroom.

Commissioners duly appointed by force of a special statute, having reported a valuation of certain lands intended to be added to the premises connected with the county jail, &c., and a motion being made at a meeting of the board of freeholders to accept such lands at the price thus fixed, and such motion being rejected, *held*, that such vote

was a rejection of the scheme, and was a finality, and that the power given by the act was exhausted: *Id.*

EVIDENCE.

Laws of Foreign Country—Interpretation of Writings.—Courts do not take judicial notice of the laws of a foreign country, but they must be proved as facts. The unwritten law of a foreign country must be shown by the oral testimony of witnesses skilled therein, and the published reports of the decisions of such country: *State v. Lung Louis*, S. C., Oregon.

The construction and legal effect of a written agreement, when introduced in evidence, is a question of law for the court, and should not be left to the determination of the jury: *Id.*

EXECUTION

Money in Custodia Legis.—Money in the hands of the sheriff collected on execution is *in custodia legis*, and is not subject to levy on a subsequent execution against the plaintiff in the first: *The State ex. rel. Kansas City National Bank v. Boothe*, 68 Mo.

Personal property of W. was seized under an attachment, and being of a perishable nature, was sold by the sheriff and the proceeds deposited in a bank on his general account. The attachment was afterwards dissolved, and an execution issued for the amount of the debt, which was delivered to the sheriff with directions to levy the same on the money in his hands: *Held*, that the money so held by the sheriff could not be seized on execution: *Id.*

FOREIGN LAW. See *Evidence*.

FRAUDS, STATUTE OF. See *Action; Specific Performance*.

GUARANTY.

For Rent—Meaning of "Occupy."—B. signed an agreement by which he guaranteed the payment of M.'s rent "so long as said M. shall occupy said premises." *Held*, that the word "occupy" denoted the whole period of tenancy: *Morrow v. Brady*, 12 R. I.

HUSBAND AND WIFE.

Sale of Wife's Goods by Husband.—Where a husband takes the personal property of his wife and sells the same to a third person, and she is not present at the sale, or afforded an opportunity to give notice of her rights, and has made no sale to her husband, or delivery to him under any contract of sale, she will not be estopped from asserting her title as against the purchaser, though he had no notice of her title. A vendor usually cannot transfer any better or greater title than he himself holds: *Klein v. Seibold*, 89 Ills.

INTERNATIONAL LAW. See *Admiralty*.

LANDLORD AND TENANT.

Notice to Quit.—The defendant was tenant to the plaintiff from year to year of a shop and premises: the plaintiff gave the defendant notice

in writing to quit on a day terminating the tenancy. The notice contained the following clause: "And I hereby further give you notice that should you retain possession of the premises after the day before mentioned the annual rental of the premises now held by you from me will be 160*l.*, payable quarterly, in advance." *Held*, by BRAMWELL and COTTON, L.J.J., BRETT, L. J., dissenting, that the notice to quit being otherwise sufficient, it was not rendered invalid by the additional clause: *Ahearn v. Bellman*, Law Rep., 4 Exch. Div.

MASTER AND SERVANT. See *Negligence*.

MORTGAGE. See *Action; Debtor and Creditor; Receiver*.

Notice of an Unrecorded Mortgage.—Any fact or circumstance that tends to give notice or informs a party that there is an encumbrance upon land, is sufficient to charge him with notice of its existence. And where an administrator's deed, under which the purchaser claimed, recited a decree which required a mortgage to be given, and that the purchaser had complied with the decree, this is sufficient notice to any one dealing with such purchaser of the existence of an unrecorded mortgage given by such purchaser: *Ætna Life Ins. Co. v. Ford*, 89 Ills.

Parties.—A bill to foreclose a mortgage should be brought in the name of the equitable owner of the notes, and not in the name of the payee for his use, but the objection that it is brought in the payee's name should be urged in the court below to afford an opportunity to obviate by amendment: *Irish v. Sharp*, 89 Ills.

MUNICIPAL CORPORATION.

A municipal corporation will not be allowed to purchase realty in order by controlling it to compel a taxpayer to abandon or compromise his litigation with the municipality: *Place v. City of Providence*, 12 R. I.

City Ordinance may be shown to be Unreasonable.—A city ordinance is not conclusive, but may be shown to be unreasonable. In a suit on a special tax bill for the building of a sidewalk, evidence is admissible to show that the ordinance authorizing its construction was unnecessary and oppressive—it being located in an uninhabited portion of the city and disconnected with any other street or sidewalk: *Carrigan v. Gage* 68 Mo.

Debts of Execution against.—A writ of *fiery facias* may issue, under the code of West Virginia, against a political public municipal corporation, upon a judgment for a debt or damages rendered by a court of competent jurisdiction: *Brown v. Gates*, 14 W. Va.

But by implication the taxes and public revenues of such corporations are exempt: *Id.*

It seems that such a corporation may sometimes own some descriptions of property strictly private, or interests in such property, or have debts of a strictly private nature due to it which are subject to levy and to the lien of such writ of *fiery facias*. But perhaps property charged with public trusts, or owned or used by such corporation for public purposes, such as fire-engines, &c., are not subject to levy or to

the lien of a *fiery facias*, upon the same principle that the taxes and revenues of such corporation are not subject to the levy or lien of a *fiery facias*, but as that question is not involved in this case it is not now decided: *Id.*

NEGLIGENCE. See *New Trial; Railroad.*

Master and Servant—Defective Machinery.—In an action brought by a workman against the corporation which employed him, to recover compensation for injuries which the plaintiff alleged were caused by the negligence of the defendant in not keeping in proper repair certain machinery operated by the plaintiff, in not keeping this machinery properly protected and boxed, and in not keeping the room in which this machinery was placed, properly lighted, it appeared that the plaintiff was a man of mature years and ordinary intelligence, and had worked at the machinery in question for four years; that the room was lighted as usual; that he had operated the machinery for weeks in its imperfect state without protest or complaint; and that no statute in Rhode Island required such machinery to be boxed: *Held*, that the plaintiff could not recover: *Kelly v. Silver Spring Company*, 12 R. I.

Held, further, that one voluntarily entering a dangerous service, knowing the danger, himself assumes the risk of his employment: *Id.*

Held, further, that one continuing to work exposed to a known danger, without complaint, without any promise that the danger shall be removed, and not under stress of special exigency, consents to the risk of his employment: *Id.*

Use of Noxious Gas—Injury to Plants.—Plants in the plaintiff's green-house connected with the public sewers, were injured by illuminating gas which escaped from the mains of the Gas Company, the defendant, into the sewers, and thence found its way to the green-houses. It appeared that when the sewers were built by the city of Providence, the earth was not properly packed, and the subsequent settling opened a leak in the gas pipes, which caused the injury complained of. In an action against the Gas Company: *Held*, that being in charge of a dangerous material, the Gas Company was bound both itself to exercise due care proportioned to the risk, and also to use similar care in preventing careless interference with its pipes by others. The company could not prevent the construction of the sewer, but was bound to see that the earth was properly put back; that the pipes were properly supported, and that all needed repairs were made with reasonable speed. *Held*, further, that the jury was to decide whether the company had exercised such care. *Held*, further, that evidence of the presence of gas in other green-houses connected with the same sewers was properly admitted: *Butcher v. Providence Gas Company*, 12 R. I.

NEW TRIAL.

Insufficiency of Damages—Negligence.—The court will grant a new trial, in an action for personal injuries sustained through the defendants' negligence, on the ground of the inadequacy of the damages found by the jury, when it appears upon the facts proved that the jury must have omitted to take into consideration some of the elements of damage properly involved in the plaintiff's claim: *Phillips v. Railway Co.*, L. R., 4 Q. B. Div.

PARTNERSHIP.

Style of—Name of Individual Member—Signature to Bill of Exchange—Liability of Firm.—If the name of a partnership firm be merely the name of an individual partner, proof that he signed such name to a bill of exchange is not enough to make the firm liable on the bill. To establish the liability, the holder of the bill must further prove that the signature was put to it by the authority and for the purposes of the firm: *Yorkshire Banking Co. v. Beatson*, L. R., 4 C. P. Div.

POSSESSION. See *Specific Performance*.

POST. See *Contract*.

RAILROAD.

Ticket issued by One Company—Train of Another—Negligence—Liability of Carriers.—The defendants have running powers over the South Western Railway between Hammersmith and the New Richmond station of the South Western Railway Company. Above the booking office at the New Richmond station are the words, "South Western and Metropolitan Booking Office and District Railway." The plaintiff took from the clerk there employed by the South Western Railway a return ticket to Hammersmith and back. The ticket was not headed with the name of either company, but bore on it the words "Via District Railway." On his return journey from Hammersmith to Richmond the plaintiff travelled with his ticket in a carriage of a train belonging to the defendants and under the management of their servants. The carriage being unsuited for the New Richmond station platform, the plaintiff, on alighting there, fell and was hurt. He brought an action against the defendants, and the jury found negligence in them. *Held*, that having invited or permitted the plaintiff to travel in their train, the defendants were bound to make reasonable provision for his safety; and that there was evidence of their liability, even assuming the ticket not to have been issued by or for them, but by the South Western Company: *Foulkes v. Metropolitan District Railway Co.*, Law Rep. C. P. Div.

RECEIVER.

Of Rents and Profits in Foreclosure Cases.—A court of chancery may, where the security afforded by a mortgage is inadequate and the mortgagor is unable to pay the deficiency, and a foreclosure proceeding is pending, appoint a receiver to collect the rents and profits of the mortgaged premises, if there are circumstances of fraud or bad faith on the part of the mortgagor, or other facts involved which would render a denial of the relief sought inequitable and unjust: *Huas v. Chicago Building Soc.*, 89 Ills.

RIPARIAN OWNER.

Navigable Stream—Meandered River—Accretions.—Where a navigable river was meandered in making the public surveys, and the United States has granted the land bounded by the meander line, the grantee takes to the river. The stream, and not the meander line, is the true boundary line of the riparian owner. Accretions to such land belong to the riparian owner, and cannot be selected as swamp and

overflowed land. An application filed in the office of the secretary of state to purchase such accretions as swamp and overflowed lands is a mere nullity, and casts no cloud on the title of the riparian owner: *Minto v. Delaney*, S. C., Oregon.

SALE. See *Husband and Wife*.

Contract, not Divisible.—The plaintiffs contracted to sell to the defendants twenty-five tons (more or less) Penang pepper, October ^{and} November shipment, name of vessel or vessels, marks and particulars to be declared within sixty days from date of bill of lading. Within the stipulated time the plaintiffs declared twenty-five tons by a vessel called the B., only twenty tons of which complied with the terms of the contract as to shipment, and made no further declaration. The defendants declined to accept any portion of the pepper: *Hehl* (by COTTON and THESIGER, L.J.J., BRETT, L. J., dissenting), that the contract was entire, and that the defendants were not bound to accept the twenty tons, but were entitled to insist upon the delivery of twenty-five tons, according to the contract: *Reuter v. Sala*, L. R., 4 C. P. Div.

SALVAGE. See *Admiralty*.

SHERIFF.

Garnishment of Money Deposited by a Sheriff.—Where a sheriff has moneys deposited in bank as such sheriff belonging to various execution creditors, and the bank is garnisheed for an individual debt of the sheriff, he may, as trustee for and on behalf of the persons for whose use he holds such moneys interplead, showing the facts of the case, and thereby protect the fund for those entitled to the same: *Meadowcroft v. Agnew*, 89 Ills.

SPECIFIC PERFORMANCE.

Parol Contract for Sale of Land—Possession.—A court of equity will not be justified in decreeing the specific performance of a parol contract for the sale of land, unless such contract is explicit in its terms; nor unless the boundaries of the land are already defined. Where possession is relied on as an act of part performance of a parol contract, in order to take the case out of the operation of the statute requiring contracts in relation to the sale of lands to be in writing, such possession must be visible, notorious and exclusive on the part of the vendee, and must have been taken under and in pursuance of the parol agreement: *Brown v. Lord*, S. C., Oregon.

STATUTE.

Intention to Govern in Interpretation of.—Statutes are sometimes extended to cases not within the letter of them, and cases are sometimes excluded from the operation of statutes, though within the letter, on the principle that what is within the intention of the makers of the statute is within the statute, though not within the letter, and that what is not within the intention of the makers, is not within the statute, it being an acknowledged rule in the construction of statutes that the intention of the makers ought to be regarded: *Brown v. Gates*, 14 W. Va.

City Ordinance—Effect of Repeal on Pending Prosecution.—The repeal of an ordinance pending a prosecution under it operates to release the defendant, unless it is otherwise provided in the repealing ordinance: *City of Kansas v. White*, 68 Mo.

Effect of Repeal.—The general rule is that when an act of the legislature is repealed without a saving clause, it must be considered, except as to transactions passed and closed, as if it had never existed: *Curran v. Owens*, 14 W. Va.

A right of action which does not exist at common law but depends solely upon statute, falls with the repeal of the statute without a saving clause or a general law saving pending suits, unless that right has been carried into judgment: *Id.*

Whether the legislature, by its Repealing Act, intended to affect suits pending, in the absence of a general law upon the subject, must be gathered from the Repealing Act itself: *Id.*

If the Repealing Act does not substantially re-enact a section of the law repealed which gave the right of action, and there is no saving clause as to pending suits, and no general law on the subject, the legislative intent is clear that all suits brought upon the repealed act fall unless carried into judgment: *Id.*

But if the section in the old act which gave the right of action is substantially re-enacted in the repealing statute, so that there is no moment of time when the repealed section was not the law, although no reservation is made as to pending suits, the re-enacted section continues in uninterrupted operation, and suits brought thereon are saved, but otherwise, as in this case, if not substantially re-enacted: *Id.*

SURETY.

Misrepresentation of Facts to.—When, with the knowledge and assent of the creditor, there is a misrepresentation with regard to material facts, and had the real facts been known and not misstated, they might reasonably have prevented the security from entering into his contract of suretyship, such contract will not be binding on the surety, though such misrepresentation was not made with a fraudulent purpose: *Warren v. Branch*, 14 W. Va.

Unless inquired of by a surety, a creditor is under no obligation to disclose facts in no manner connected with the business which is the subject of the suretyship, though such facts would probably have a decided influence on the surety in determining whether he would enter into the contract, but if a material fact connected with the contract of suretyship which might influence the surety in entering into the contract, is fraudulently concealed with a view to benefit the creditor, such concealment, though no inquiry is made by the surety, would discharge him: *Id.*

But though the simple failure of a creditor to communicate to a surety a fact material for the surety to know, and though this fact be connected with the contract of suretyship, will not generally vitiate the contract unless the concealment by the creditor was fraudulent even though the principal in procuring the security to enter into the contract acted fraudulently, yet if the dealings are such as fairly to lead the creditor, if a reasonable man, to believe that the principal must have used

fraud by suppressing facts or otherwise, in procuring the surety to enter into the contract, and such fraud has been used, it will vitiate the contract as to the surety though no act of fraud be traced to the creditor: *Id.*

TAXATION.

When Enjoined.—A court of chancery has jurisdiction to enjoin the collection of a tax, and will exercise it in all cases where the tax has been levied without authority of law, or where the property is not subject to taxation: *Kimball v. Merchants' Savings Loan and Trust Co.*, 89 Ills.

TENDER.

Bringing Money into Court.—A party who, in a court of equity or law, relies on a tender of money in satisfaction of a debt, must bring into court when he files his pleading setting up such tender, the amount of money so tendered, unless this production of the money is waived by the other side. And if he fails to do so, this defence to the payment of the debt and any proof in relation thereto will be disregarded by the court: *Gilkeson v. Smith*, 14 W. Va.

TRUST AND TRUSTEE.

Resulting Trust—Parent and Child.—Where a father purchases a tract of land in the name of a son, and in the written contract the vendor is required, upon the payment of the purchase-money, to convey the land to the son, and the father pays the purchase-money, the son can, in a court of equity, compel the vendor to convey the land to him, there being in such case no resulting trust in the father: *Lorentz v. Lorentz, Ex'r*, 14 W. Va.

VENDOR AND PURCHASER. See Action.

Lien of Vendor.—A married woman bought certain realty of K., and in part payment gave her sole note secured by her sole mortgage. The note not being paid and the record title to the realty remaining in her name unencumbered, K. filed a bill in equity against her and her husband to establish his vendor's lien for the purchase-money on the realty in question. *Held*, that he was entitled to the relief claimed: *Kent v. Gerhard*, 12 R. I.

VERDICT.

Juror—Impeachment of Verdict.—A juror will not be allowed to impeach his verdict by his affidavit that he would not have found the defendant guilty, if he had known that the punishment fixed by law for the crime charged was death: *The State v. Shock*, 68 Mo.

WILL.

Undue Influence.—When a will is shown to have been duly executed, the law presumes competency in the testator, and that it contains his unconstrained wishes in regard to distribution of his property, but this presumption may be rebutted by showing that it was obtained by fraud and undue influence: *Greenwood v. Cline*, S. C., Oregon.

What constitutes undue influence is one of those inquiries which, in its nature, cannot be referred to any general rule, but depends upon the circumstances of each case: *Id.*

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SUBROGATION BY THE INSURER TO THE INTEREST
OF THE MORTGAGEE.

THE doctrine of subrogation on the part of the underwriter, in cases of loss where the mortgagee insures in his own name, and pays the premium out of his own funds, has already become well-settled law in several of the states. The courts of Pennsylvania, New York, New Jersey and Illinois have repeatedly held that the mortgagee can not, after payment of his debt by the underwriter, enforce his claim against the mortgagor, but that the underwriter is substituted to the rights of the mortgagee.

The main reasons assigned for this ruling are, that to allow the mortgagee to have a double satisfaction would be to ignore the principles of suretyship, to sanction a system of wagers which would be contrary to the policy of the law, and to furnish a dangerous temptation to incendiarism. The contrary doctrine is still the law in Massachusetts, and since the able opinion of Chief Justice SHAW in the case of *King v. The State Mutual Fire Insurance Co.*, 7 Cush. 1, has found favor with the courts of that state.

"We are inclined to the opinion," say the court, "both upon principle and upon authority, that where a mortgagee causes insurance to be made for his own benefit, paying the premium from his own funds, in case a loss occurs before his debt is paid, he has a right to recover the total loss for his own benefit, that he is not bound to account to the mortgagor for any part of the money so recovered as a part of the mortgage-debt; it is not a payment in

whole or in part, but *he still has a right to recover his whole debt of the mortgagor.*"

There can be no question that the argument of the chief justice has at least the merit of plausibility. He adds, "What then is there inequitable on the part of the mortgagee toward either party in holding both sums (the debt and the insurance money)? They are both due upon valid contracts made with him, made upon adequate consideration paid by himself. There is nothing inequitable to the debtor; for he pays no more than he originally received in money loaned; nor to the underwriter, for he has only paid upon a risk voluntarily taken, for which he was paid by the mortgagee a full and satisfactory equivalent." The court further supposes a case in which the mortgagee has paid the premiums on a policy taken out in his own name for twenty years, after which time the buildings burned down—an exaggerated illustration, but one which assists the reasoning of the case—the mortgagee would recover his debt while the underwriter would be, if he could satisfy his claim against the mortgagor, the gainer in the additional premiums. Following the decision of this case is *Suffolk Insurance Co. v. Boyden*, 9 Allen 123, where the court held that if the interest of the mortgagee in possession has been insured *eo nomine* at his own expense, the insurers, in case of a loss by fire before the mortgage-debt is paid, can not, upon an offer to pay the loss and amount due upon the mortgage, before the loss, maintain a bill in equity to have the mortgage assigned to them and be subrogated to the rights and remedies of the insured under the mortgage.

The distinctions drawn by counsel between that case and the case of *King v. The State Mutual Fire Insurance Co.* were disposed of by Judge HOAR, who held that whether the insurance was expressly made upon the interest of the assured as mortgagee or upon his interest in the property which was only that of mortgagee without disclosing its precise character, the same ruling applied as in the case of *King v. The State Mutual Fire Insurance Co.* To the question why the mortgagor should not pay the premiums and be entitled to treat the debt as cancelled, it is answered, "because the insurance is a wholly collateral contract which the law allows the mortgagee to make, with which the mortgagor is not concerned." And in concluding the court say: "The whole consideration proceeds from the mortgagee; if there is no loss by fire he loses the whole amount paid without any claim upon the mort-

gagor for compensation. The premiums paid are intended to be a just compensation for the sum to be received upon the happening of a contingent event." To the same effect are the cases of *White v. Brown*, 2 Cush. 416; *Foster v. Mutual Life Insurance Co.*, 2 Gray 216; *Dobson v. Land*, 8 Hare 216; *Graves v. Hampden Insurance Co.*, 10 Allen 283.

In examining the cases which have upheld the doctrine of subrogation, but few will be found which present the same issues as the case of *King v. The State Mutual Fire Insurance Co.*, and many of those which are cited in support of the principle are cases in which the doctrine has been announced as an *obiter dictum*, and not as a final judgment on the question. The case of *Smith v. The Columbia Insurance Co.*, 17 Penn. St. 253, may furnish the nearest analogy as one of the early decisions of the courts of that state upon the subject. The principal reasons which induced the court to hold that the insurers were entitled to subrogation, arose out of the nature of the case. There had been prior mortgages effected on the property concealed by the assured, and the insurers were deceived in assuming a risk at a lower rate of premium than they would have done had they known the facts. Upon the question of subrogation, the court cite no authorities, and simply say that "the insurer is entitled to the cession of the security is proved by analogy from marine insurance, from fire insurance in respect of recourse to the hundred, and from the contract of suretyship."

Neither do the cases of *Insurance Co. v. Updegraff*, 21 Penn. St. 513, and *Ætna Insurance Co. v. Tyler*, 16 Wend. 385, present the question in an analogous light. The main issues here were whether the vendor, having a lien for unpaid purchase-money, had an insurable interest, and it was held that he could recover the whole amount of the unpaid purchase-money, and the vendee could have no interest therein. That the insured was entitled to subrogation was only a collateral issue.

In *Roberts v. Traders' Insurance Co.*, 17 Wend. 631, the mortgagor was the insured and the policy was assigned to the mortgagee as collateral security for the debt. It was the insurance effected upon the interest of the mortgagor at his expense and for his ultimate benefit.

In *Carpenter v. Washington Providence Insurance Co.*, 16 Pet. 495, s. c. 4 How. 185, the doctrine of subrogation was simply an-

nounced as an *obiter dictum*, and was not necessary to the decision of the question, which was, whether a prior policy effected by mortgagor, containing a clause giving him permission to assign it to an undisclosed mortgagee, covered the latter's interest. It was held that it only covered the interest of the mortgagor, and such a policy constituted other insurance by the insured within the meaning of a clause concerning prior insurance, in a subsequent policy taken by the mortgagor from another company.

In *Home Insurance Co. v. Western Transportation Co.*, 4 Rob. 267, the question was mainly decided upon principles of marine insurance.

Among the later cases supporting this doctrine is *Honore v. Lamar Insurance Co.*, 51 Ill. 409, where an insurance was effected on seventy-four barrels of whiskey, by the mortgagee. The court dismisses the case with the remark that to give the mortgagee a right to enforce his claim after payment of his loss by the insurance company against the mortgagor, would be to favor wager policies, and to furnish a dangerous temptation to incendiarism.

In *Norwich Fire Insurance Co. v. Boomer*, 52 Ill. 442, the mortgagor had paid the premium, and was the beneficiary party.

In *Springfield Insurance Co. v. Allen*, 43 N. Y. 389, and *Foster v. Van Reed*, 70 N. Y. 19, though it was stipulated in the policy, that the insurer should be subrogated to the rights of the assured on payment of loss, it was contended that such a clause had no effect, and that the mortgagee, notwithstanding, should enforce his claim against the mortgagor.

With the exception of Massachusetts, it is believed that no state has sanctioned the rule giving the mortgagee his remedy against the mortgagor, on payment of loss by the insurer. While the courts have generally held that where the mortgagee insures his interest and there is a loss, the premiums having been paid out of his own funds, he is not bound to account to the mortgagor, nor to apply it in payment of his debt (*King v. State Mutual Fire Insurance Co.*; *Ætna Insurance Co. v. Tyler*; *Carpenter v. Washington Providence Insurance Co.*, above cited; *White v. Brown*, 2 Cush. 412; *Russell v. Southard*, 12 How. 139; *Concord Fire Insurance Co. v. Woodruff*, 45 Me. 354), they have not denied the right of the insurer to take the place of the mortgagee when they have compensated him for loss.

Whether the insurance of the mortgagee's interest was an insur-

ance of the debt or of the mortgaged property, seems to have long been a disputed question, and the majority of the cases which have supported the doctrine of subrogation have held that the mortgagee in insuring his interest insured the mortgage-debt simply. While this would depend considerably upon the nature and the terms of the policy, it seems that even where the policy in express terms provided that the mortgagee's interest was insured to cover specific property, the debt alone was considered as being insured: *Smith v. Col. Insurance Co.*; *Ætna Fire Insurance Co. v. Tyler*; *Carpenter v. Providence Insurance Co.* Judge STORY, in the latter, case says, "Where the mortgagee insures solely on his own account, it is but an insurance of his debt, and if his debt is afterwards paid or extinguished, the policy ceases from that time to have any operation." In *Insurance Co. v. Woodruff*, 2 Dutch. (N. J.) 541, the court say, "That the insurance by the mortgagee was necessarily an insurance of the debt, because he had no other interest, and that the insurers were entitled to be subrogated not only to the mortgage-debt, but every other collateral security by which the debt was secured."

In *Angel on Insurance*, sect. 59, it is said: "The insurance of the mortgagee is an insurance of the debt, and if his debt is afterwards paid or extinguished, the policy from that time ceases to have any operation; even if after that the premises are destroyed by fire, he has no right to recover for the loss if he has sustained no damage thereby." Judge GIBSON, in 17 Penn. St. 253, states that, "The mortgage insures not the ultimate safety of the whole property but only so much of it as may be enough to satisfy his mortgage. *It is not the specific property which is insured but its capacity to pay the mortgage-debt, in effect the security is insured.*"

On the other hand, this doctrine is denied in *King v. Mutual Fire Insurance Co.*, where the court say, "The contract of insurance with the mortgagee is not an insurance of the debt or of the payment of the debt; that would be an insurance of the solvency of the debtor. It is not broken by the non-payment of the debt nor saved by its payment." And in *Kernochan v. N. Y. Bowery Fire Insurance*, 17 N. Y. 428, the policy in that case insured the mortgagee against loss or damage by fire to the amount of \$6000, such loss or damage not to exceed in amount the sum insured, as shall happen by fire to the property during the term of one year.

"The contract," say the court, "is in the nature of an insurance of the property, and not of the mortgage-debt. If the insurance was of the debt there should, to warrant a recovery, be a loss as to the debt which has not occurred and cannot take place, as the mortgaged property still far exceeds in value the sum unpaid and the debtors are solvent. Regarding the insurance as of the debt, no risk has been insured by the defendants, the policy was not only of no possible benefit, but worse, it has been a source of constant expense."

And, finally, in the case of *The Excelsior Fire Insurance Co. v. The Royal Fire Insurance Co. of Liverpool*, 55 N. Y. 348, the judge on this question, says: "To say that it is the debt which is insured against loss, is to give to fire insurance companies a power to do a kind of business which the law and their charter do not confer. They are privileged to insure property against loss or damage by fire: they are not privileged to guarantee the collection of debts. If they are, they may insure against the insolvency of the debtor."

The principle of these cases is based, no doubt, upon the view which the courts have taken of the nature of a mortgage. In Massachusetts, as well as in the other New England states, the mortgage-deed is held to create a seisin of an estate in the premises, in the mortgagee, with the incidents belonging thereto at common law, such as a right of possession, to be enforced, if need be, by ejectment or other suit at law, as well as the right upon the failure of the mortgagor to redeem, to become, by a process of foreclosure, the absolute owner of the premises. While in other states, among which are New York and Illinois, it is assumed that the mortgage-deed creates an interest in the mortgaged premises answering to an estate in the mortgagee, his rights and remedies in respect to the same are limited to such as the rules of equity prescribe and may not be enforced by suit at law.

It is generally held now, that an insurance by the mortgagee is an insurance of the mortgaged property, and though the doctrine of subrogation prevails, it owes its existence to those cases which have held that the insurance of the mortgagee's interest is solely an insurance of the mortgage-debt.

W. H. WHITTAKER.

CINCINNATI, O.

RECENT AMERICAN DECISIONS.

Supreme Court of New Jersey.

JAMES A. WRIGHT ET. AL. v. EMMA M. REMINGTON.

The statute of the state of Illinois which provides that "contracts may be made and liabilities incurred by a wife, and the same enforced against her to the same extent and in the same manner as if she were unmarried," empowers a married woman in that state to sign a note as surety for her husband.

Such a contract is not so in conflict with the general interest of the body of the citizens of New Jersey, or its public policy, as to afford a reason for a non-enforcement of the contract in that state.

A threat made by a husband through procurement of one of the payees of a note executed by the husband that unless his wife signed such note he would poison himself, and which threat was made to induce, and did induce her to sign, does not amount to duress, and is, in law, no defence to an action against her upon such note.

Parol declarations made by the payee of a note to the maker, endorser or guarantor thereof, at the time of the signing, to the effect that such maker, endorser or guarantor would not be called upon to pay the note, are not admissible in evidence, and are therefore no defence to an action upon such note.

THE statement of the case shows that this cause involved the trial of two feigned issues framed to try the validity of two judgments entered upon notes, with warrant to confess judgment against Emma M. Remington. The said notes were signed by Emma M., and her husband, S. Remington, at Chicago, and were payable at the same place. They were made payable to the order of Kent & Keith, and were endorsed by them to the plaintiff after maturity. It appeared on the trial that Emma M. signed these notes as surety for her husband, S. Remington. To meet this the plaintiff offered in evidence the public laws of 1861, of 1869, and the Revised Statutes of the year 1874, of the state of Illinois. Each contained acts relative to married women, the most important entitled "An act to revise the law in relation to husband and wife." Rev. (Ill.) p. 576.

When the plaintiffs rested, a motion to nonsuit was made, on the ground that the laws of Illinois were not sufficiently proved, and that it was not shown that there was no such law in Illinois as the fifth section of the New Jersey Married Woman's Act. This motion was refused.

On the part of the defendant it was shown that, at the time of making the notes, Emma had been separated from her husband two or three months. It was proved that the husband, to induce his wife to sign, threatened self-destruction by taking poison unless she

signed them. It was in evidence that Kent, one of the payees, and his lawyer, Rockwell, solicited Mrs. Remington to sign the notes. She swore that Kent said to her that she would not be obliged to pay the notes. And that he said to her that "all he wanted was my name as security; he would let Mr. Remington pay them afterward; Mr. Rockwell said that if he were I he would sign the notes; I would not be obliged to pay them; Mr. Remington would pay them by work."

The charge to the jury was as follows:

"Another ground of defence is, that these notes were signed by her in consequence of threats, made by the husband, of self-destruction unless she executed them, and that, having been signed under that compulsion, she insists that she is not liable. This ground of defence resolves itself into two questions:

"First. If the threats were made by the procurement of Kent & Keith, or their agent, Rockwell, to bring about the execution of the notes, and if they were operative in getting her signature to the notes, it would amount to a legal defence to this action.

"Second. If the threats were made without the knowledge of Kent & Keith, or their agent, and were of such a character and made under such circumstances as might reasonably be expected to take from the defendant the power of choosing whether she would sign the notes or not, and she did, in fact, sign them in that state of mind, and would not have signed them at all but for such threats, you may, for the purposes of this case, consider that she cannot be held liable for the payment of the notes. The burden of showing this is upon Mrs. Remington."

In charging the jury about the third ground of defence, the court said: "There is another ground of defence, viz., that at the time of the execution of the notes, it was represented to Mrs. Remington, by Kent & Keith and their agent, Mr. Rockwell, that the signing was a mere matter of form, and she would not be held liable. If you believe that these representations were made, and that the defendant signed the notes on the faith of them, this is a good defence."

A verdict was returned for the defendant, Emma.

The cause was certified by the trial judge to this court for the advisory opinion of this court upon a motion for a new trial.

H. A. Drake, for the plaintiff.

R. S. Jenkins, for the defendant.

The opinion of the court was delivered by

REED, J.—The admission of the statutes of Illinois was entirely proper under the provisions of section 22 of our Evidence Act: Rev., p. 381. The last statute offered was relied upon by the plaintiffs to show the validity of the contract of married women in Illinois, the place of the making and performing the same. The 6th section of the said act—Rev. (Ill.) 1874, p. 576—is as follows: “Contracts may be made and liabilities incurred by a wife, and the same enforced against her to the same extent and in the same manner as if she were unmarried, but, except with the consent of her husband, she may not enter into or carry on any partnership business, unless her husband has abandoned or deserted her, or is an idiot, or insane, or is confined in the penitentiary.”

The proviso contained in the 5th section of our Married Woman's Act is absent from the Illinois statute, and there appears in the latter no restriction upon the contractual ability of the married woman to become endorser, surety or guarantor. Subject to the exceptional instances of her engaging in partnership business, she is as unrestricted as a *feme sole*. There can, therefore, be no question but that the contract was valid by the law of Illinois.

It is, therefore, the duty of the courts of this state to recognise and enforce it, unless it appears injurious to the interests of the state or of our citizens. But nothing approaching this result can be deduced solely from the fact that the foreign statute confers upon a married woman the power to make a contract of suretyship.

That it would have been an act of legislative wisdom to have incorporated into the Illinois act a provision similar to that in our own and the New York state Married Woman's Act, by which the married woman is restrained from assuming a liability as surety, I think the testimony in this case demonstrates. But whatever may be our opinion of the policy of legislation beyond our state, we are bound by the principles of comity to recognise its validity, unless it clearly contravenes the principles of public morality or attacks the interest of the body of the citizens of our state. This does neither, and there is no force in the objection taken upon this ground.

The next ground of contention by the defence at the trial was relative to the effect of the acts of the husband, and also of one of

the payees and his attorney toward the married woman before and at the time of signing these notes.

The court charged the jury, substantially, that if threats were made by the husband, through the procurement of the payees or their agent, that he (the husband) would kill himself unless she signed, and the threats were made for the purpose of inducing, and did induce, her to sign the notes, then the woman was not liable upon the notes. The court also charged that even if the threats were made without the knowledge of the payees, and were of such a character as to deprive her of the power to choose whether she would or would not sign, &c., then she was not liable. Both of the above instructions were given obviously upon the assumption that the facts upon the existence of which they were predicated, showed such a coercion of the will of the woman as to deprive her of the power of volition, and so the contract was stripped of an essential element, namely, the assent of both parties to its terms.

The common law, however, very early guarded the stability of contracts by a rule which required the exercise of a much higher degree of coercive force than here appears, before the question of want of the power of consent could be entertained as a question of fact. The degree of restraint or terror to which the party must be subjected, as a ground for avoiding his contract, must rise to what the law recognised as duress, and the statement of the grounds of such avoidance appears in the earliest books of authority: *Bac. Abr.*, "Duress."

These grounds were stated in the case of *Sooy, ads., v. State*, 9 Vroom 329, and a repetition of them here would be profitless. The language in the opinion in that case, although used in reference to the avoidance of a bond, is applicable to the avoidance of any contract, sealed or unsealed.

In turning from the statement of what is essential to constitute a defence upon the ground of duress, to the facts in this case, it at once appears that they do not make a case within the rule laid down relative to such defence. There was no imprisonment of the woman or threat of imprisonment. There was no threatened injury to her person.

The influence was, that her husband threatened, not to injure her, but to kill himself. It is true that there is the statement in the books that duress to a wife will avoid a deed made by the hus-

band under that influence. Bac. Abr., "Duress," B. It may be that had the payees of the note or their agent, threatened to take the life of the husband, unless the wife signed the note, and she signed under the influence of the terror excited by such threats, it would have avoided the contract. But here the threats were made by the husband against his own life. The maker and the object of the threats were the same. Their execution was within his own power of volition. The wife knew that no harm could come to him except by his own act. The present case is utterly unlike an instance of the presence of some overshadowing danger, uncontrollable by either the wife or the person endangered.

There is no trace of a doctrine that the threat of a husband against himself will avoid the contract of his wife, or conversely, and such a rule would lead to an instability in that class of contracts which would be vicious.

I am unable to perceive that any duress, in the sense in which the law has heretofore regarded it, exists in this case, either to the husband or through him to the wife.

It is true that the privilege which the law, in many states, has conferred upon the married woman to contract with and for the benefit of any one, including her husband, raises novel questions.

And where the contract is for the husband's benefit in those states where that is possible, the method by which the wife was induced to enter into the contract, will probably afford frequent occasions for judicial supervision. But to break down the rules of the common law in treating of the validity of the contract of any person whom the legislature has seen fit to invest with an unfettered contracting ability, would lead to confusion and uncertainty.

The avoidance of contracts upon the ground of undue influence, where, although there is no duress, one of the parties has taken advantage of the situation of the other, is a matter of purely equitable cognisance, and can receive no recognition in a court of law.¹ 1 Chit. on Con. 273; 1 Story's Eq. Jur., § 239.

¹ In *Miller v. Miller*, 68 Penn. St. 486, AGNEW, J., said: "Nor is there a duress *per minas* in equity, which does not exist at law: *Stouffer v. Latshaw*, 2 Watts 168. The power of mind necessary to give assent to a contract, is the same in law and equity. A chancellor, it is true, will refuse his aid to enforce specific performance of a contract, for a reason less than that constituting duress *per minas*, or will set aside a bargain for extortion or undue influence operating upon a weak mind, or under circumstances of a confidential relation; but equity will not set aside an agreement on the ground of duress *per minas* alone, where the law will refuse to do so."

I think there was no defence upon this part of the case.

The third ground of defence was, that at the time of the execution of the notes, it was represented to Mrs. Remington that the signing was a mere matter of form, and that she would not be held liable. There is no rule better settled than that evidence of contemporaneous parol declarations is inadmissible to vary the terms of a written contract.

In the enforcement of this rule, there is often a strong tendency to disregard its effect induced by a feeling of the inequity of holding a party to the strict performance of an agreement into which he has entered, upon an assurance that it would not be enforced according to its terms. This feeling has led courts sometimes to recognise the parol declaration, upon the ground that it amounted to an equitable estoppel. Notes to *Duchess of Kingston's case*, 3 Smith's Lead. Cas. 729. But the rule of evidence that when the contract is reduced to writing, the writing is the only evidence of the contract, excludes any evidence of the parol declarations.

The rule is recognised as a wholesome doctrine by which men are enabled to place their agreements in a shape undisturbable by the uncertainty of oral testimony. The weight of authority is overwhelming in favor of holding, in the language of the American editors of the *Duchess of Kingston's Case*, that "a person who is so ill-advised as to execute a written contract in reliance upon an assurance that it shall not be literally enforced, must submit to the loss if he is deceived, and cannot ask that a principle of great moment to the community shall be made to yield for the sake of relieving him from the consequences of his indiscretion." See cases cited in note, *supra*.

This rule prevails in equity as well as at law: *Woollam v. Hearn*, 2 Lead. Cas. in Eq. (3d ed.) 679.

The rule is applied, in its entire rigor, to notes and bills: 2 Parsons on Notes and Bills 501; *Meyer v. Beardsley*, 1 Vroom 236.

The Circuit Court is advised that no legal defence to the notes in question was offered, and that the verdict should be set aside.

It has long been settled that a man may avoid his own act: 1st. For fear of loss of life. 2d. Of loss of member. 3d. Of mayhem, or of great bodily harm; and 4th. Of imprisonment. See

Bac. Abr. "Duress," A.; Co. Lit. 253 b; *Foss v. Hildreth*, 10 Allen 76; *Foshay v. Ferguson*, 5 Hill 154; *Bogle v. Hammons*, 2 Heisk. 136; *Belote v. Henderson*, 5 Cold. 474; *Baker v. Mor-*

ton, 12 Wall. 158; *Brown v. Pierce*, 7 Wall. 214; *Helm v. Helm*, 11 Kan. 19.

At the present time, however, it is doubtful whether the doctrine ought to be confined within such narrow limits, and there seems a growing tendency in the courts of this country to extend the old common-law rule so as to include many cases which formerly would not have been considered duress. As observed by BRONSON, J., in *Foshay v. Ferguson*, 5 Hill 158, as civilization has advanced, the law has tended much more strongly than it formerly did to overthrow everything which is built upon violence or fraud. See also *Tapley v. Tapley*, 10 Minn. 458, per BERRY, J.; *United States v. Huckabee*, 16 Wall. 432, per CLIFFORD, J.; *Waller v. Parker*, 5 Cold. 476; *Mann v. Lewis*, 3 W. Va. 223; *Mann v. McVey*, Id. 238; Ewell's Leading Cases on Disabilities 771, *et seq.*; 1 Pars. on Cont. (5th ed.) 395.

Thus, the old authorities, and some modern, say that menacing to commit a battery, or a mere trespass to lands or goods, is not sufficient to avoid the act, because such a threat ought not to overcome a firm and prudent man, and because the law would afford adequate redress, if actually committed: Bac. Abr. "Duress," A.; Bro. Abr. "Duress," pl. 16; 2 Inst. 483; *Sumner v. Ferryman*, 11 Mod. 203, cited in 2 Str. 917; 2 Greenl. Ev., § 301; 1 Chit. on Cont. (11th Am. ed.) 271. But at the present time it is believed that a menace of battery or destruction of property, provided the freedom of the will is overcome and the act procured thereby, would avoid the act: *Foshay v. Ferguson*, *supra*; *Tapley v. Tapley*, *supra*; *United States v. Huckabee*, *supra*; *Waller v. Parker*, *supra*; 1 Pars. on Cont. (5th ed.) 395. See also Roll. Abr. 687, pl. 3, 12; s. c. Book of Assizes 20, pl. 14; 9 Vin. Abr. 317, "Duress," B 3; *Loomis v. Ruck*, 65 N. Y. 462.

So, the older authorities nearly all maintain that a threat to burn one's house or other property, does not amount to duress. See Bac. Abr., "Duress," A; Perkins, § 18; 1 Bl. Com. 130; *Edwards v. Handley*, Hardin 615; *Maisonnaire v. Keating*, 2 Gall. 337. See also Metc. on Cont. 25. But the tendency and weight of modern American authority seems to support the contrary position. See *Foshay v. Ferguson*, *supra*; *Bingham v. Sessions*, 14 Miss. 22; *Walter v. Parker*, *supra*; 1 Chit. on Cont. (11 Am. ed.) 272; 1 Story on Cont. (5th ed.) § 516; 1 Pars. on Cont. (6th ed.) 395.

The case of duress of goods, so-called, as laid down in the leading case of *Susportas v. Jennings*, 1 Bay 470; s. c. Ewell's Lead. Cases 782, may be mentioned as another instance of the relaxation under certain circumstances of the strict rule of the common law as to what constitutes duress. Although the doctrine of this case is opposed to that of *Skeate v. Beale*, 11 Ad. & Ell. 983, s. c. Ewell's Lead. Cases 775, it may probably be considered as supported by the weight of American authority. See *Collins v. Westbury*, 2 Bay 211; *Bingham v. Sessions*, 14 Miss. 22; *Nelson v. Suddarth*, 1 Hen. & Mun. 350; *Crawford v. Cato*, 22 Geo. 594; *Miller v. Miller*, 68 Penn. St. 493; *White v. Heylman*, 34 Id. 142; *Spaids v. Barrett*, 57 Ill. 293; *Bennett v. Ford*, 47 Ind. 264; *Modlin v. N. W. Turnpike Co.*, 48 Ind. 492. See, however, *Hazelrigg v. Donaldson*, 2 Met. (Ky.) 445; *Jones v. Bridge*, 2 Sweeny 431; *Burr v. Burton*, 18 Ark. 233. In *Miller v. Miller*, 68 Penn. St. 486, AGNEW, J., said: "We concur with the counsel of the defendant in error that in civil cases the rule as to duress *per minas* has a broader application at the present day than it formerly had. Where a party has the goods or property of another in his power so as to enable him to exert his control over

it to the prejudice of the other, a threat to use this control may be in the nature of the common-law duress *per minas*, and enable the person threatened with this pernicious control to avoid a bond or note obtained without consideration, by means of such threats. See *White v. Heyman*, 10 Casey 142, where the authorities are collected. But mere threats of injury, in regard to property, without a power over it also, to enable the party to execute his threats, are not in themselves duress *per minas*, however otherwise they may enter into questions of fraud or extortion."

So, in *Topley v. Topley*, 10 Minn. 448, threats by a husband to abandon his wife, which she thought "would be a family scandal" clearly threatening injury to her good name, accompanied by general abusive treatment, were held to be duress, so as to avoid a deed executed by her under a reasonable apprehension that they would be carried into effect.

In 14 Am. Law Reg. N. S. 201, Mr. W. H. Phillips has learnedly considered the question as to what amounts to duress *per minas* at law; and, after a review of the old and modern Roman law rules, as well as the leading English and American cases upon the question, he submits the following eminently reasonable propositions:

1. "That any unlawful threats amount to duress *per minas*, sufficient to avoid a contract or agreement, if such contract or agreement would not have been entered into, if the threats had not been used."

2. "That the question whether a contract or agreement was entered into through fear, is a question of *fact*, for the jury to decide in each individual case, and that therefore it would be erroneous for a judge to charge as a principle of law, that the duress, in order to avoid the obligation, must have been such as was calculated to overcome the will of a man of ordinary firmness of mind."

Tested by the foregoing considerations, the principal case, so far as it touches upon the question of duress, is not satisfactory. If the jury found that the threats, which were operative in procuring the wife's signature, were made by the procurement of the payees of the notes, it would seem clear that their legal effect is the same as if made by the payees themselves. See *Cooley on Torts* 533, 534. And the fact that the immediate maker and object of the threats were the same, affords, as it seems, no sufficient reason for holding it not to be duress, so long as her freedom of will was overcome thereby, as the jury must have found. It is well settled that the husband may avoid an act done by reason of duress to his wife, and conversely that the wife may avoid an act by reason of duress of her husband: 2 Brownl. 276; Bac. Abr., "Duress," B.; *Plummer v. The People*, 16 Ill. 360; *Brooks v. Berryhill*, 20 Ind. 97; *Eadie v. Slimmon*, 26 N. Y. 9; *Green v. Scranage*, 19 Iowa 461. By reason of the legal unity of the husband and wife, it would seem that the legal effect of such a threat, provided it in fact overpowered the wife's will, must be the same as if it were directed towards her own person, and to hold otherwise is a mere sticking in the bark of a legal technicality, the real question being, was there any assent to the contract, was the act of the wife the offspring of her own free will, or to the act of another acting by the procurement of the payees? The argument that such a rule would lead to an instability in that class of contracts which would be vicious, has no weight whatever, where the jury have found as in this case, that the contract was not the act of the wife, but of another, unless it is deemed advisable to give stability to contracts procured by duress and fraud, at the expense of the rights of married women. Duress by a stranger, by procurement of the party that shall have the benefit, is a

good cause to avoid: 43 E. III. 6; Rolle Abr. 688, s. c. Much more should it be good cause to avoid, when the immediate agent is the husband, even though the threat is aimed at his own person and not the wife's.

It is true that it has been said that duress by a stranger without making the obligee party thereto, is no cause to avoid: Keilw. 154 a; Bac. Abr., "Duress," B. See also *Talley v. Robinson*, 22 Gratt. 895. But this proposition has with good reason been questioned: 1 Story on Contracts (5th ed.), § 578. See also *Vander Hoven v. Nette*, 32 Tex. 184; *Olivari v. Menger*, 39 Id. 76. And unless the rights of innocent third parties have intervened which would be prejudiced by the avoidance

of the act, it would seem the more reasonable rule to hold that the want of assent renders the act voidable, even though the party claiming the benefit of the act may not have been privy to the duress. The fact that a note was originally obtained by duress, will not be a good defence to the note in the hands of a *bona fide* holder for a valuable consideration paid before its maturity: *Hogan v. Moore*, 48 Geo. 136; *Carke v. Peace*, 41 N. H. 414. But this principle can not affect the decision of this case, for the reason that the notes sued on were indorsed to plaintiffs after maturity.

MARSHALL D. EWELL.

Chicago, June 19, 1878.

Supreme Court Commission of Ohio.

BIRDSALL v. HEACOCK.

A letter addressed to a lumber merchant in the following language: "Please send my son the lumber he asks for, and it will be all right," is a guaranty that the lumber sold and delivered to the son, at the time of its presentation, will be paid for.

But such guaranty is not *continuing*, so as to make the guarantor liable for lumber subsequently purchased by the son from the same merchant. And payments afterward made by the principal, on account, will be applied in satisfaction of the first purchase, and consequent discharge of the guarantor's liability.

ERROR to the Court of Common Pleas of Stark county.

The original action was brought by plaintiff in error, in the Court of Common Pleas of Stark county, against one T. C. Heacock, as principal debtor, and the defendant in error, as guarantor, seeking to recover a balance remaining due on an account for lumber sold and delivered by plaintiff's firm to the said T. C. Heacock. The first items of the account bore date May 11th 1868, and were of the value of \$226. Then followed sundry items for lumber delivered at different dates, extending down to January 1869, and amounting in the aggregate to \$2962. Credits were given for payments, at sundry times, to the amount of \$2522. The present defendant demurred, on the ground that the facts

stated did not constitute a cause of action against him ; and on this demurrer judgment was rendered in his favor.

To reverse this judgment on the demurrer, the plaintiff filed his petition in error in the District Court, where the question of error was reserved for the decision of the Supreme Court.

That part of the petition which states the complaint against the present defendant, was as follows :—

“ And the plaintiff further says that, in consideration that the firm of E. H. Potter would sell to said T. C. Heacock lumber at his request, such as he would need in the business of a builder and lumber merchant ; which business said Heacock was about to engage in at the time he commenced purchasing lumber of said firm ; the said Edwin Heacock did promise and guarantee in writing to said firm, that he would be accountable to said firm for whatever lumber said firm might sell to said T. C. Heacock in his said business, and make it all right, a copy of which guaranty is here given as part hereof :—

“ ‘ Alliance, May 11th 1868.

“ ‘ E. H. POTTER : Please send my son the lumber he asks for, and it will be all right. I had to get him to write this, as I was kicked with a horse one week ago on the arm, and cannot more than write my name, if that.

“ ‘ Signed,

EDWIN HEACOCK.’

“ That said T. C. Heacock is the son of Edwin Heacock, and at the time of writing said guaranty and the commencement of dealing between said firm and him in said account, the said T. C. Heacock was about to engage in the business of building houses and keeping a lumber-yard for the sale of lumber of all kinds, in the village of Alliance, in said county of Stark, and had no capital or credit of his own ; that he expected to carry on said business through several seasons, all of which was known to the said E. H. Potter and to said Edwin Heacock, and in order to give him, said T. C. Heacock, such credit from the said firm as he might desire in his said business, said Edwin Heacock executed said letter of guaranty and delivered it to his son, T. C. Heacock, who is the son mentioned therein, for the purpose of its being delivered to the firm of E. H. Potter, as a guaranty to them, and to procure credit for his son, and it was signed and executed by said Edwin Heacock, on or about May 11th 1868, and produced to said firm and

delivered to it by said T. C. Heacock when he first applied to them to buy lumber. And, induced by said letter, and in faith of said promise and guaranty, which was then delivered to said firm in the way of his business as such builder and keeper of a lumber-yard, and for reasonable prices, and on reasonable terms, agreed upon between said firm and said T. C. Heacock, said firm sold lumber to said T. C. Heacock, at different times, as shown in the foregoing account, for the purpose of enabling him to carry on his said business, in all amounting to the sum of \$2962.51, up to September 15th 1871, on which the sum of \$2522.78 has been paid as aforesaid, and the credit and time of payment of the said lumber by said Heacock to said firm has long since expired, and yet said T. C. Heacock has not, nor has said Edwin Heacock, paid said sum yet due, nor any part thereof. And of all of said premises said Edwin Heacock had frequent notice, and yet he refuses to pay the said firm, and to this plaintiff, as surviving partner thereof, the said sum so due, or any part thereof, although often requested so to do."

Joseph Parker, for plaintiff in error.—The writing of Edwin Heacock is an absolute guaranty as soon as acted upon, without special notice of its acceptance: *Powers v. Bumerantz*, 12 Ohio St. 273.

The weight of recent decisions in England and in this country establishes the following rules for the construction of guaranties:

1. They are governed by the same rules of construction as other contracts.
2. They are most strongly construed against the guarantor, and there is a presumption in favor of validity.
3. The court must give effect to the intention of the parties.
4. To arrive at the intention of the parties, the circumstances under which, and the purposes for which, the contract was made may be proved, and must be kept in view in its construction: *Crist v. Burlingame*, 62 Barb. (N. Y.) 35; *De Colyar on Guaranties* 214; 2 *Parsons on Contracts* 500; *Salmon Falls Co. v. Portsmouth Co.*, 46 N. H. 249; 10 *Ad. & E.* 309; 5 *Conn.* 149; 3 *Kernan* 232; 8 *Johns.* (N. Y.) 119; 24 *Wend.* 82; 3 *Denio* 512; 5 *Allen* 47.

Construing this writing in the light of the rules laid down, Edwin Heacock meant to bind himself to pay any balance owing to the plaintiff by T. C. Heacock: *Sickle v. Marsh*, 44 *How.* 91;

De Colyar on Guaranties 240, 244, 245, 246, 247, 248; *Boehm v. Murphy*, 40 Mo. 57.

James Amerman, for defendant in error.—The liability of Edwin Heacock must be gathered from the entire instrument written by him. It cannot be forced upon him by proof or allegation *aliunde* the instrument. What he intended must appear in writing because of the Statute of Frauds: *Bushnell v. Bishop*, 28 Ill. 204; *Russell v. Clark*, 7 Cranch 62.

If the instrument is a sufficient and legal guaranty, then, as such guaranty, it became exhausted by the first purchase under it: *Dixon v. Frusee*, 1 E. D. Smith 30; *Kay v. Groves*, 6 Bing. 276; *Hayden v. Crane*, 1 Lans. 181; *Anderson v. Bleakly*, 2 W. & S. 237; *Whitney v. Groot*, 24 Wend. 82; *Gard v. Stephens*, 12 Mich. 292; 119 Mass. 435.

The opinion of the court was delivered by

SCOTT, J.—Counsel for defendant in error claims that the instrument of writing upon which the petition in this case bases the liability of his client is not a guaranty of any kind. The petition, however, avers that it was acted upon as a guaranty by the plaintiff's firm; and from its terms we think it was intended by the writer that it should be so understood and acted on. It is not a representation as to the solvency or pecuniary circumstances of the party about to ask credit from the plaintiff; but a request or direction that such credit should be given, and an unqualified assurance that the doing so would "be all right." The sale and delivery which it directs or requests could only be made "all right" to the plaintiff by punctual payment, according to the terms of the sale. And we think the writing imports a guaranty of such payment. It was an absolute assurance that the lumber which might be delivered to defendant's son, at his request, would be paid for.

But, within a week from the date of this guaranty, the son obtained from the plaintiff lumber to the value of \$226, on the faith of this guaranty, this being the full amount that he then asked for; and this amount he has since fully paid for. The only question arising on the demurrer to plaintiff's petition is, whether the guaranty in question is a *continuing* one, referable by its terms to other and subsequent sales of lumber, made by plaintiff to defendant's son, or whether its terms limit it to a single transaction.

We see no good reason why contracts of warranty should not be

construed by the rules applicable to the construction of contracts generally. As contracts by which the guarantor assumes the position of a surety, and becomes responsible for the default of his principal, there would seem to be good reason for not holding him liable beyond the express terms of his agreement; and, on the other hand, there can be no good reason why a guarantor, who procures a credit to be given which would have otherwise been refused, should not be held liable to the full extent warranted by the terms of the guaranty. In all written contracts, we think the language of the parties should be so construed as to give effect to their clearly ascertained intention. And, as an additional rule, we think it well settled that all contracts, in which the terms are in any respect equivocal, should be read in the light of the circumstances under which they were entered into. This is to be done, not for the purpose of varying the intention of the parties, as disclosed by the writing, but of ascertaining what the parties, in fact, meant by the doubtful language employed for the expression of their intention. The language of the guaranty in this case is, "Please send my son the lumber he asks for, and it will be all right."

There is no express limit to the quantity of lumber to be furnished. This is left to depend solely on the pleasure of the purchaser. But it may well admit of doubt whether it contemplates more than a single purchase. Its language is in the present tense. And it might, therefore, be held that this language embraces only such lumber as the guarantor's son should ask for, upon the presentation of the guaranty. And as it contains no express reference to future transactions, such, we think, should be its construction, if read without regard to the circumstances under which it was written or acted upon. And in support of such a construction, it is certain that many authorities, both English and American, might be cited. In order, therefore, to extend the meaning of this guaranty beyond the necessary import of its terms, the petition under consideration states that it was written and acted upon under certain circumstances which are supposed to give its language a meaning that it would not otherwise import. But, looking to all the circumstances stated in the petition, we think they are not sufficient to give the guaranty relied on a more extended meaning than its terms would ordinarily import. It is averred that the guarantor knew that his son was about engaging in the lumber business,

which he expected to carry on for several seasons. But the writing contains no reference to that fact; and it is not averred that the son expected or intended to make a series of purchases of lumber from the plaintiff, and that this fact was known to the father. It is also alleged that the plaintiff, from time to time, furnished to the son the different bills of lumber stated in their account, in reliance upon this guaranty. But it is not alleged that this fact was, during this time, known to the father, or acquiesced in by him. Had such been the fact, it would be a practical construction of his contract, by the guarantor, which we might well adopt and enforce.

Looking, then, to the language of the guaranty, its operative words are: "Send my son the lumber he asks for, and it will be all right." This language clearly imports that the father knew that his son was desirous of procuring some lumber from the plaintiff upon credit. He clearly intended to procure such credit for his son by guaranteeing payment for such lumber as his son should ask for and obtain upon the presentation of the writing to the plaintiff. And we think it does not clearly import more than this. The guaranty is co-extensive with the order or direction given, and this order was fully complied with when the plaintiff, upon its presentation, sold and delivered to the son the lumber which he then asked for.

Many cases might be cited in which similar language has been confined in its interpretation to a single transaction: *Whitney v. Groot*, 24 Wend. 82; *Gard v. Stevens*, 12 Mich. 292; *White v. Reed*, 15 Conn. 457; *Anderson v. Blakely*, 2 W. & S. 237.

On the other hand, cases are not wanting in which guaranties no more comprehensive in their form of expression have, under the circumstances of the case, been construed as continuing.

Upon this subject, it has been well said, that "the chief difficulty lies in determining what interpretation should be put on a guaranty which is so worded that it may either extend to a series of sales or advances, or be limited to the first. The better opinion would seem to be, that such an instrument should be confined to the immediate transaction, unless the language of the promise is sufficiently broad to show that it was meant to reach beyond the present, and render the guarantor answerable for future credits. The tendency of decision in this country has, accordingly, been against construing guaranties as continuing, unless the intention

of the parties is so clearly manifested as not to admit of a reasonable doubt." 2 Am. Lead. Cas. 141; citing *Congdon v. Read*, 7 R. I. 576; *Gold v. Stevens*, 12 Mich. 292; *White v. Reed*, 15 Conn. 457; *Whitney v. Groot*, 24 Wend. 82; *Webb v. Dickerson*, 11 Id. 62; *Aldriche v. Higgins*, 16 S. & R. 213; *Anderson v. Blakley*, 2 W. & S. 237.

We are of opinion that the judgment of the Court of Common Pleas should be affirmed.

Judgment affirmed.

1. Even courts and text books, with but few exceptions, fail to accurately distinguish between guaranty and suretyship. In truth, the popular meaning of the terms is the one generally laid down by our law writers. The dividing line seems wholly imaginary; not that they do not distinguish between the principal and conditional contract of warranty, but the appellation of guaranty, or suretyship, is applied indifferently to either kind of contract. Thus in 2 Parsons on Contracts 3, "a guaranty is held to be a contract by which one person is bound to another for the due fulfilment of a promise, or engagement of a third party." (Same definition for a surety.) Ibid. 5. "No special words are necessary to constitute a guaranty" (or surety). Hilliard on Contracts, vol. 2, 28, § 1, "Suretyship is one of the forms in which one may incur liability for the benefit of another." Ibid. 29. "But the established distinction between suretyship and other contracts of the same general class, is by no means accurately observed in the language of courts or of elementary writers, and one may incur the liability of a surety without the use of that particular word." All of above remarks are applied also to guaranty.

So Addison on Contracts 3, § 1111, "The condition or undertaking of a surety is a contract by one person to be answerable for the payment of some debt, or the performance of some act or duty, in case of the failure of another

person who is himself principally responsible for the payment of such debt, or the performance of the act, or duty." (Same definitions for guaranty.) •

Even Kent fails to draw the line, for in his vol. 3, 121, "a guaranty, in its enlarged sense, is a promise to answer for the payment of some debt or the performance of some duty in the case of the failure of another person who, in the first instance, is liable."

So in the English case of *Wright v. Simpson*, 6 Vesey 734, Lord Eldon says, "The surety is a guaranty."

To the same tenor are most of the different state courts. But in Pennsylvania a broad, sharp line of variance has been laid down.

Thus, in one of the earlier cases, *Marberger et al. v. Potts*, 4 Harris 9, the court in deciding that an engagement endorsed on a promissory note as follows: "I hereby acknowledge to be security for the within amount of \$500 until satisfactorily paid by W. A.," was a contract of suretyship, say, "The word 'security' has an established and well-known meaning in the minds of most people and indicates an obligation to stand for the sum absolutely unless discharged by the supine negligence of the obligor after notice. It is in broad contrast with the word 'guaranty,' which imparts a conditional liability if due steps are taken against the principal."

In *Allan v. Hubert*, 13 Wright 259, the question arose whether "For con-

sideration received I hereby agree to become security for the faithful performance of the above agreement," was a guaranty, or a suretyship. The Supreme Court, in deciding it (STRONG, J.), say, "We are of opinion that he undertook as surety. His engagement was direct, not contingent."

But in *Reigart v. White*, 2 P. F. Smith 438, which is the leading case on the subject, the court is particularly happy and transparently clear in its ruling. The matter before it was this, Emory having contracted for goods to be paid for in nails, Reigart wrote to the seller, "If you have not shipped the goods, ship immediately, and I will be responsible for the delivery of the nails by Emory." The court (AGNEW, J.) deciding it to be a suretyship, not a guaranty, says, "It would be difficult to define the commercial contract of guaranty so clearly as to reconcile all the adjudged cases lying upon the confines between guaranty and suretyship. But there is one element in the former to be found in all guaranties which seldom fails as a mark of distinction. * * A guaranty is an engagement to pay in default of solvency in the debtor, provided due diligence be used to obtain payment from him, * * a contract of suretyship being a direct liability to the creditor for the act to be performed by the debtor, and a guaranty being a liability only for his ability to perform this act. In the former the surety assumes to perform the contract of the principal debtor if he should not, and in the latter the guarantor undertakes that his principal can perform; that he is able to do so. From the nature of the former, the undertaking is immediate and directs that the act shall be done, which, if not done, makes the surety responsible at once, but from the nature of the latter non-ability (in other words, insolvency) must be shown."

In *Kramph's Executrix v. Hutz's Executors*, 2 P. F. Smith 525 (WOODWARD,

C. J.), the court say, "A surety, by his contract, undertakes to pay if the debtor do not; the guarantor undertakes to pay if the debtor cannot. The one is the insurer of the debt, the other an insurer of the solvency of the debtor."

Woods v. Sherman, 21 P. F. Smith 100, and *Ashton v. Bayard*, Id. 139, are analogous cases.

So in Massachusetts in *Dule v. Young*, 24 Pick. 252, the court (SHAW, C. J.) in holding that the words "Please send W. goods to the amount of \$100 and I will guaranty the same in four months," to be a guaranty, and not a suretyship, said, " * * * the contract contained in the written papers * * * was a collateral undertaking to pay in case that Wetherbee should not, and was, therefore, strictly a guaranty for the debt of another."

We may gather from the above cases that a suretyship is a contract to pay if another *does* not; a guaranty, a contract to pay if another *can* not.

2. The view taken by the court in the principal case as to what constitutes a continuing guaranty seems to be the correct one, viz., that the intention of the parties gathered from the four corners of the writing, coupled with the actions of the parties under the same, must determine the nature of the guaranty.

Thus in *Michigan State Bank v. John Peck*, 28 Vt. 200, the following contract was held to be a continuing guaranty: "C. C. Trowbridge, Esq., President, Detroit, R. H. & Co., are authorized to value upon us, or either of us, to the amount of \$2500, in such amounts and on such time as they may require, which will be duly honored, and we hereby jointly and severally hold ourselves accountable for the acceptance and payment of such drafts," the court (REDFIELD, C. J.) saying, "The terms used would certainly more naturally incline me to regard it as a single

guaranty for \$2500, and there to end. But when we find the plaintiff acting upon it as a continuing guarantee, and the defendants assuming the drafts without objection, it is impossible to doubt that it was so intended by all the parties. And as the terms used are altogether consistent with such construction, we think the practical construction given it by all the parties must be held binding upon them. In other words, where the terms of a guaranty will admit of its continuance, the practical construction put upon it by all parties is the true one."

In *Hotchkiss v. Barnes*, 34 Conn. 27, a guaranty in these words, "Mr. H., you can let D. have what goods he calls for, and I will see that the same are settled for," was held to be a continuing contract, the court (PARK, J.) saying, "The decisions are not uniform" (as to guaranties) "in the conclusions arrived at, from the fact that no two cases can be found precisely alike, and different courts have established different rules of construction. * * * In relation to the rule that should govern courts in construing contracts of this description, the weight of authority gathered from all the cases upon this subject, is in conformity to the rule of construction adopted by our own court, that the contract of a surety must be construed according to the intent of the parties."

In 2 Kent Com. 557, the rule is laid down thus, "The true principle of sound ethics is, to give the contract the sense in which the person making the promise believed the other party to have accepted it, if he in fact did so understand and accept it."

Dixon v. Frazer, 1 E. D. Smith (N. Y.) 32, is somewhat similar to the principal case. There the father told the plaintiff's clerk, that his son, Isaac, would want some hardware, and requested that the plaintiff would "let

him (the son) have what he wanted, and he (defendant) would see that he (plaintiff) was paid." Hardware was furnished to the son in consequence. A running account was opened for four years, until Frazer (son) failed. The purchases were made from time to time, though the defendant made no other promises to pay. The court (WOODRUFF, J.) in holding that it was not a continuing guaranty, said, "An agreement of this description, will not be deemed a continuing undertaking unless its language clearly indicates that such was the intention of the parties. The defendant plainly had been in some manner apprised that Isaac would want some hardware; when that want was satisfied, the purpose and scope of his promise was accomplished."

In *Baker v. Rund*, 13 Barb. 152 (N. Y.) a letter as follows, "Gents, whatever goods you sell to A. B. to be sold in our store, we will consent that he may take the money out of our concern to pay for the same, &c. The said A. shall have the liberty of taking the pay out of our concern as fast as the goods are sold," was held not to be a continuing guaranty, the court (HAND, J.) saying, "A claim against a guarantor is *strictissimi juris*; and the intention should be clear and manifest. * * * If the plain terms of the contract may be fulfilled by being confined to one transaction, courts are not anxious to extend it to others. There should be words showing the contemplation of a continuous supply." To the same effect are *Lewis v. Dwight*, 10 Conn. 100; *Lee v. Dick*, 10 Peters 482; *Dobbin v. Bradley*, 17 Wend. 425; *Russell v. Clark's Ex'rs*, 3 Cranch 69.

3. The rule as to notice seems to be, that if the matter guaranteed was peculiarly within the purview and knowledge of the plaintiff, or where he had to exercise some option, notice must be given; but where the guarantor knew, or could

easily have known if he would, none is necessary; nor is it where the guarantor is not prejudiced by lack of it.

Thus in 3 Kent 123, "The rule (as to a guaranty) is not so strict as in the case of negotiable paper, and the neglect to give notice must have produced some loss, or prejudice to the guarantor."

So in *Bull v. Bliss*, 30 Vt. 127, the court (BENNETT, J.) says, "The law merchant does not extend to guaranties, and as the case shows the utter insolvency of the principal, there is no ground to claim the defendant has been damnified for want of an earlier notice. * * * It has been frequently held that if the notice is not in time to enable the guarantor to save himself harmless, the defendant must show it, and that in a case where the defendant could not have suffered for want of it, it is dispensed with."

In *Parkman v. Brewster*, 15 Gray (Mass.) 291, the court (MERRICK, J.) lays down the rule thus, "If there has been no unnecessary delay or negligence on the part of the holder of a guaranteed note, it does not appear to be an essential pre-requisite to the maintenance of an action against the guarantor, that a demand when the note became due should have been made upon, or that he should then have been notified of the default of the maker. The rule is somewhat different when the guarantee is of a debt which is subsequently to be created, when the party cannot know beforehand whether he is to be ultimately liable, or not, nor to what extent, it is necessary in order to charge him, that he should have reasonable notice of the amount of the indebtedness incurred by the principal debtor and of his failure to pay it."

Still more clearly and emphatically is the rule laid down in *Bashford v. Shaw*, 4 Ohio St. 263 (BARTLEY, J.), delivering the opinion of the court, says, "Demand and notice are requisite to charge a guarantor, where the fact on

which his liability is made dependent, rests peculiarly within the knowledge of the guarantee, or depends on his option. But where the fact which determines the liability, is one which the guarantor knows, or is bound to know, or which is equally within the power of both parties to ascertain; in other words, where each party has, in legal contemplation, equal means of information, the guarantor must take notice at his peril. * * *

So in *Vyse v. Wakefield*, 6 Mees. & W. 442 (Exchequer), Lord ABINGER, C. B., decides, "The rule is" (as to notice in cases of guaranty) "that where the party stipulates to do a certain thing in a certain specific event, which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice unless he stipulates for it; but where it is to do a thing which lies within the peculiar knowledge of the other party, then notice ought to be given. * * *" Baron PARKE, in same case, says, "* * * My present impression is that where any option at all remains to be exercised on the part of the plaintiff, notice of his having determined that option, ought to be given."

So also *Harwood v. Ramsey*, 15 S. & R. 31; *Egenbush v. Lang*, 28 Penn. 193; *Brackett v. Rich*, 23 Minn. 485.

4. But as to acceptance, a much stricter rule obtains, requiring notice of the acceptance of the guaranty as a pre-requisite to liability.

Thus in *Kellogg v. Stockton*, 5 Casey (Penn.) 460, the court (LEWIS, C. J.), held, "It is essential in such a case" (that of a guaranty) "that the plaintiff should accept and give credit on the faith of the proposition; and it is equally necessary that the guarantor should be notified that his offer has been accepted, otherwise there is no contract. A mere offer not accepted, is not a contract; and mere mental acceptance of a proposition, not communicated to the

party to be charged, is not an acceptance at all in the eye of the law. * * * It has been said that notice of acceptance is not necessary where the agreement to accept the guaranty is contemporaneous with it: *Wildes v. Savage*, 1 Story 26. This has been generally considered an exception to the rule,* * * but it merely affirms that when the guarantor is present, and the agreement to accept is made the moment he offers it, this is notice, and surely neither law nor common sense require more."

So in *Cahuzac & Co. v. Samini*, 29 Ala. 288, the court (STONE, J.) decides, "To render an offer" (to guaranty the

payment of a debt) "binding as a guaranty, reasonable notice must be given that it is accepted as such, and credit given on the faith of it." * * * "This rule as to notice, it seems, does not apply to cases where the guarantor and creditor reside in the same city, and the agreement to accept is contemporaneous with the guaranty."

See also, *White v. Reed*, 15 Conn. 457; *Lawson v. Town*, 3 Ala. 373; *Tuckerman v. French*, 7 Greenl. 115; *Kay v. Allan*, 9 Barr 320; *Unangst v. Hibler*, 2 Casey 153; *Mussey v. Rayner*, 22 Pick. 224; *Beckman v. Hale*, 17 Johns. 134. G. W. REED

Supreme Court of Iowa.

BALDWIN v. CHICAGO, ETC., RAILROAD CO.

An employee is entitled to have furnished to him machinery that is safe and of a proper kind, but this means not that it shall be such as will make accidents impossible, but that in view of the advantages to the business it shall be the best.

While it is the duty of a railroad company to use the best practicable appliances in the construction of its own cars, yet it is not negligence to receive from connecting roads for transportation over its own line, cars differently constructed. If the cars are such as are in ordinary use upon other roads, it is the duty of the company to receive them, and it is not liable to its own employees who may be injured by the unfamiliar machinery.

The construction of railroad cars, the mode of working them, and the effect of a particular thing on their safety and usefulness, are questions upon which the opinion of experts is admissible.

APPEAL from Cass Circuit Court.

The plaintiff, claiming to be an employee of defendant, whose duty it was to couple and uncouple cars, was injured while in the performance of his duty without fault on his part, but through the fault and negligence of the defendant, as he claimed. The act of negligence stated in the petition consisted in having on its track cars, "the couplings, bumpers or chafing irons, commonly called dead-woods," which were not the usual ones in use upon said road, nor such as had been in use thereon at any time during which plaintiff had been in the employ of defendant; "but that the same were of an old and unusual pattern, not now in use upon the cars of defendant, and were imperfect and defective." While engaged in coupling such cars the plaintiff was injured.

There was a trial, verdict and judgment for plaintiff, and defendant appeals.

Wright, Gatch & Wright, and Rising, Wright & Baldwin, for appellant.

Sapp, Lyman & Ament, for appellee.

The opinion of the court was delivered by

SEEVERS, J.—The plaintiff had only been working for defendant three or four days when he was injured. He had no previous experience in the business. There was no evidence tending to show the cars were out of repair; the contrary clearly appeared. There is no dispute but the cars the plaintiff attempted to couple had at each end double dead-woods on each side of the draft-iron, about a foot from it, and projecting out even with the draft-iron. The evidence did not show the cars to be faulty in their construction in any other respect. They did not belong to the defendant, but had been received on its track in the ordinary course of business from some connecting road. The uncontradicted evidence was that cars constructed as these were, were used by Eastern roads and were more or less frequently hauled over Western roads, including defendant's; being usually employed in the through freight business. The double dead-woods are not used by Western roads generally in constructing their own cars. It was, however, disclosed by the evidence that they are so used by the Illinois Central Railroad. The defendant's cars are constructed with but a single dead-wood on each end, through which runs the draft-iron. It did not appear from the evidence how long the double dead-woods had been used or how old the pattern was.

The court instructed the jury as follows:

"The specific matters which the plaintiff charges against the defendant in this case as negligent are, that it had upon its track in its yard, and required him to work about cars that were improperly constructed; in that they had couplings and buffers of an old and unusual pattern, differing from those usually in use on defendant's road, and different from any plaintiff had before seen or worked with, and more dangerous than those ordinarily in use, and that he was not informed thereof.

"It is the duty of the defendant, so far as its own cars, or cars controlled by it, are concerned, to place upon its track, and in use

by its employees, only such as are well constructed for the purpose for which they are used, and to see that they are equipped with such appliances as experience shows are best calculated to insure the safety of its employees.

"It is also the duty of the defendant, under the law, to receive and draw over its railway the cars of any connecting railway when requested, provided such cars are in good repair and properly constructed and equipped.

"But the defendant is not obliged, and ought not, to receive upon its track and compel its employees to handle cars which by reason of want of repair or faulty construction, or improper appliances, are shown by experience to be so dangerous to the lives of its employees as that ordinary prudence would forbid their use.

"And if the cars which caused the injury to plaintiff were, by reason of having the double dead-woods or buffers, so extraordinarily dangerous to handle as that ordinary prudence would forbid their use, then it would be negligent on the part of the defendant to either have such cars of its own on its road, or to receive from other roads and transport them, and require its employees to handle them."

This instruction submits to the jury to be determined: 1. Whether cars constructed as these were are "more dangerous than those ordinarily in use." 2. Have the cars in question been "shown by experience to be so dangerous to the lives of its employees as that ordinary prudence would forbid their use?" 3. Whether the cars were, by reason of "having the double dead-woods or buffers, so extraordinarily dangerous to handle as that ordinary prudence would forbid their use?" If these several propositions, or any of them, were found in favor of the plaintiff, then, as a matter of law, the defendant was negligent in receiving and having such cars on the road.

The jury were further instructed: "In determining whether cars so equipped with double dead-woods or buffers are so unusual, old-fashioned and dangerous as that it will be negligent to use them, you ought to consider the difference between their construction and that of other patterns, the manner in which couplings have to be made, whether defendant has such cars of its own in use, and how generally they are in use upon well-equipped roads, and whether or not any discrimination has ever been made by railroad companies or experienced railroad men against cars so con-

structed, and any other matters shown in evidence bearing on this question."

This instruction contains another thought at least on the same subject, which is that in determining the question of negligence, the jury might take into consideration "whether the defendant had such cars of its own in use."

The foregoing instructions constitute the law of the case, and therefore the conclusion is irresistible that the material question for the jury was whether these cars were more dangerous than those ordinarily in use, or so extraordinarily dangerous to handle as to make it negligence to receive them.

Two witnesses on the part of the defendant gave evidence as to the construction of the cars, and it is not claimed they were not competent as experts.

They were asked by counsel for defendant, what advantage double dead-woods afforded to cars; what effect they would have, if any, in protecting the cars from being driven together in the course of transportation; whether with a higher degree of caution cars so equipped could be coupled with safety. Upon the grounds of incompetency and irrelevancy, objections to these questions were sustained.

The questions were evidently designed to elicit from the witnesses that the cars were not improperly constructed, and that they possessed certain advantages because of the double dead-woods. If this had been shown it would have tended to justify their use. Even if more dangerous to employees, the other advantages might more than overbalance this defect. Employees are only entitled to have used the best practical appliances, having in view the business of the road. It will not do to say that only such appliances shall be used as will render accidents impossible. The additional danger from such cars, must be regarded as ordinary and incidental to the business. If their use was justifiable under any circumstances, the degree of caution required was material, and whether or not they could be coupled with safety.

The case at bar, we think, is distinguishable from *Hamilton v. The D. V. Railroad Co.*, 36 Iowa 31, and *Muldowney v. The Illinois, &c., Railroad Co.*, Id. 462. In the former, the question was: "What is the proper way to couple cars when timber projects" over the end of the cars. This question had reference to the conduct of the plaintiff, and the design was to show he had not

used proper care, and it was said, "certainly an opinion of the witness in regard to the caution exercised by the plaintiff is not admissible." In substance the same ruling under a different state of facts was made in the *Muldowney case*.

It is admitted that no general rule can be laid down on this subject. The nearest approach thereto is, we think, stated in the *Muldowney case*. It is there said, among other things: "Where the question so far partakes of the nature of a science as to require a course of previous habit or study in order to the attainment of a knowledge of it," the opinion of witnesses competent to speak, should be received. The construction of cars, the mode and manner of operating them, and the effect of a particular thing on their safety and usefulness is a habit, study or science.

We feel satisfied that the ordinary juror would not know the effect of these double dead-woods, or whether they possessed any advantages or disadvantages over others. We, therefore, think the court erred in excluding the evidence sought to be introduced.

Taking the foregoing instructions together, the rule is laid down that the defendant was bound to receive and haul these cars over its road only in the event the jury should find that they were in good repair and properly constructed, and the jury were authorized to find, because of the double dead-woods, they were improperly constructed, notwithstanding the uncontradicted testimony showed they were in the usual course of business used on other roads.

As has been said, it was the duty of the defendant to make use of the best practicable appliances known and in use in the construction of its own cars. *Greenleaf v. Ill. Cent. Railroad Co.*, 29 Iowa 14. But what should be the rule in a case like the present was not determined. If the jury have the right to infer negligence because of the double dead-woods, then it is, and must continue to be negligence, in and of itself, for the defendant to receive such cars or haul them over its road. This precise question, as to cars constructed like these, was determined in *I. B. & W. Railroad Co. v. Flanagan*, 77 Ill. 365, and it was held that such act did not constitute negligence.

It must be borne in mind that the question is, whether it is negligence for the defendant to receive and transport cars of other roads in general use, and in the ordinary course of business which are not constructed with the most approved appliances.

Public policy has some bearing on this proposition. It is

undoubtedly of great importance to the trade and commerce of the country that a car once loaded should go through to its destination without breaking bulk. It is unnecessary, it is believed, to enlarge on this point, as its importance will be readily acknowledged.

Suppose, then, the Union Pacific Railroad Company should deliver a car constructed as these were to the defendant, which was loaded with merchandise destined for New York, and as provided in the code, sect. 1292, and in strict accordance therewith, request the defendant to transport the same, would the defendant be bound to receive such car, and for a refusal, would it be liable in damages—the only ground of refusal being that it was dangerous to its employees to transport such a car, while, on the other hand, it would be shown that cars so constructed were in use on all other roads.

It is sufficient to say that it admits of great doubt whether such a defence should be permitted to prevail.

The occasional or frequent use of such cars on any road in the ordinary course of business, is one of the ordinary risks an employee assumes. He knows, or is bound to know, that cars from other roads are being constantly hauled over the road whose employee he is. The most ordinary observation will teach him this. He must know these cars may be differently constructed. To our knowledge, at least, there is no general rule in relation thereto, and the evidence in this case discloses the fact that none such exists. He may well require that the cars provided by the company whose employee he is should have all the modern appliances; but it is not reasonable that he, at the expense of the commerce of the country, should require this as to all other cars that may be transported in the usual and ordinary course of business. The question is not in the case whether one company is bound to receive from another cars which are out of repair. We have, therefore, no occasion to determine it.

It follows, from what has been said, that in giving the instructions aforesaid the court erred.

Reversed.

The principal case discusses the liability of the master for injuries to the servant occasioned by the instrumentality employed in the transaction of the business. That the employer is not liable for the injury resulting from coupling cars of different construction,

where the danger is obvious, is settled also by the case cited of *I., B. & W. Railroad Co. v. Flanagan*, 77 Ills. 365, and also by *Fort Wayne, Jack. & Sag. Railroad Co. v. Gildersleeve*, 33 Mich. 134.

But it is apparent that injuries to the

employee from the agency employed may be of as great variety as the agencies themselves. What then are the underlying principles upon which the liability of the master is to be determined in such cases?

It is a well-established general principle that the master is bound to furnish such appliances as are reasonably necessary for the safety of his employees: *Greenleaf v. Ill. Cent. Railroad Co.*, 29 Iowa 15; *Mad River & Lake Erie Railroad Co. v. Barber*, 5 Ohio St. 511; *Laning v. N. Y. Cent. Railroad*, 49 N. Y. 521.

When he has done this he has ordinarily discharged his duty, since the servant must necessarily take the risks which are incident to the business, and which cannot be foreseen. Besides, there never can be implied an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself: *Priestley v. Fowler*, 3 Mees. & Wels. 5.

The principle we are considering is modified by the fact that in our time most of the cases arise where the masters are corporations, which are obliged to intrust the construction of their machinery to others, and the management of it to the fellow servants of those who may be injured.

In such cases the only ground of liability of the master to the employee for injuries resulting from the carelessness of a co-employee, is that which arises from personal negligence, or from want of proper care and prudence in the management of the business, or in the selection of the agents or appliances: *Warner v. Erie Railway Co.*, 39 N. Y. 468.

The doctrine that one servant cannot sue the master for injuries occasioned to him by a fellow servant, is extended to the case of the construction of the instrumentality by which the injury happened; as where a servant miscon-

structed a scaffold, in consequence of which a part of it broke, whereby a fellow servant fell to the ground and was killed: *Wigmore v. Wigmore*, 5 Exch. 352.

But the circumstances of construction may be such as to impute negligence to the master, in which case he will be liable: *Ford v. Fitchburg Railroad Co.*, 110 Mass. 260.

So, the master will be liable if he gives special directions as to the employment of a machine, and a compliance with which leads to an accident: *Ind. & Cin. Railroad Co. v. Love*, 10 Ind. 554.

In this connection also, the question of liability may arise where the servant whose neglect causes the injury, is superior in employment to the servant who is injured. We understand, this principle, as creating liability, is only applied where the business in which the servants or agents are employed, is different in its general character and purpose, and where the two servants cannot be said to be acting in concert with each other, or in such a way that the duties of each have reference to and directly tend to a common end: *Hurd, Admr., v. Vt. & Con. Railroad Co.*, 32 Vt. 473.

The cases frequently turn upon the question of notice of the quality and fitness of the instrumentality employed; the doctrine being that before an employee can recover for an injury happening to him in the course of his service, through defects in the machinery used in the discharge of his duties, he must prove actual notice to the master of the defects: *McMillan v. Saratoga & Wash. Railroad Co.*, 20 Barb. 449; *Keegan v. Western Railroad Co.*, 4 Selden 175; *Mad River & L. S. Railroad Co. v. Barber*, 5 Ohio St. 565; *Hayden v. Smithville Manuf. Co.*, 29 Conn. 548.

And, if the employee has the same means of knowledge of the appliances of the business that the master has, he

cannot recover for injuries occasioned by those appliances being defective: *Hayden v. Smithville Manuf. Co.*, *supra*; *Priestly v. Fowler*, *supra*; *Seymour v. Maddox*, 16 A. & E. N. S. 326; *Williams v. Clough*, 3 Hurl. & Norm. 258; *Hurd Admr. v. Vt. & Con. Railroad Co.*, *supra*. And if the employee has knowledge of the defects, and the master not, the latter will not be liable: *McGlynn v. Brodie*, 31 Cal. 376.

So, where both parties know of the defects, each takes the risk, and the master will not be liable unless he gives special directions: *Ind. & Cin. Railroad v. Love*, 10 Ind. 557.

Where the defects are not known, and could not be learned, as concealed defects in the timbers of a bridge, the master is not liable: *T. P. & W. Railway Co. v. Conroy*, 61 Ills. 162.

Nor where the character and sufficiency of a railroad switch is unknown: *Ladd v. New Bedford Railroad Co.*, 119 Mass. 412.

Nor from the falling of the roof of a mine: *Hall v. Johnson*, 3 Hurl. & C. 589.

Nor where a machine was used for a

dangerous and improper purpose, and one for which it was not provided nor intended: *Felch v. Allen*, 98 Mass. 572.

Nor where the defect in a ladder was unknown: *Chicago & Alton Railroad Co. v. Platt*, 89 Ills. 141.

But it is the imperative duty of the master to select fit and competent servants, and he will be held guilty of negligence if he fails to do so: *Gilman v. Eastern Railroad Co.*, 10 Allen 238; *Warner v. Erie Railway Co.*, 39 N. Y. 468; *Frazier v. Penn. Railroad Co.*, 38 Penn. St. 164; *Lawler v. Androscoggin Railroad Co.*, 62 Me. 466.

It has been held, however, that where a servant of good character and proper qualifications has been employed, these traits will be presumed to continue in him until the master has notice of a change, or of such facts as would put a reasonable man upon inquiry: *Chapman v. Erie Railway Co.*, 55 N. Y. 585.

Where the ground of liability is the neglect to select fit and competent servants, this must be specially alleged: *Lawler v. Androscoggin Railroad Co.*, *supra*. C. H. W.

Supreme Court of Missouri.

THE STATE v. COLLIER.

Where a candidate for a public office publicly pledged himself to the voters of his district that, if elected, he would perform the duties of his office for less than half the fees allowed by law, and in consequence of such representations and pledge, taxpayers were induced to vote for him, who would not otherwise have voted in his favor, whereby he was elected: *Held*, that such an offer and pledge tended to corruption, was demoralizing in its tendencies and utterly subversive of the plainest dictates of public policy, and that the title to the office thereby obtained was invalid.

ON demurrer to *quo warranto*. It appeared that at a convention of the taxpayers of Callaway county, held in August 1878, to nominate candidates for certain offices, the respondent offered a resolution that the nominees of the convention should pledge themselves to perform the duties of the offices to which they might be

elected, for much less than the compensation allowed by law; that respondent was nominated at said convention for the office of Probate Judge, made the pledge above referred to, and at the election following received a majority of the votes for said office. The Attorney-General filed an information for a *quo warranto*, to which respondent demurred.

The opinion of the court was delivered by

SHERWOOD, C. J.—The legal sufficiency of the information being questioned by the demurrer, requires at our hands an examination into such alleged sufficiency.

Every one will concede that it is of the first importance that popular elections should be conducted in such a way as to exempt them, so far as the infirmities incident to human agencies will permit, from improper influences. Here the demurrer confesses that, being induced by the offers of respondent to take for his own use only \$1200 out of \$2600, the aggregate fees of the desired office of Judge of Probate, two hundred of the voters and taxpayers of the county, who would otherwise have voted for respondent's rival, changed their purpose and voted for respondent, who, but for such offers and their acceptance, would never have been elected. These admissions of the demurrer throw the burden of the assumed lawfulness of his acts upon the shoulders of the respondent, and the question arising upon the admitted facts is, whether the means employed by him to secure his election were lawful means—means such as this court can sanction, when the respondent, called upon by our writ of *quo warranto* to disclose his title to the office of Judge of Probate, discloses also that his title must, for its validity, ultimately rest upon the means of whose employment the state in her information complains.

In the recent case of *State v. Purdy*, 36 Wis. 213; s. c. 14 Am. Law Reg. N. S. 90, the question raised by this information was learnedly and exhaustively discussed, and in such a manner as to leave nothing to be desired, and the conclusion there reached that means similar to those employed in the present instance were not to be tolerated, and that the title to the office secured thereby would be declared invalid. There the contest was between two individuals as to which was entitled to the office of county judge; the relator claiming it in consequence of the reception of twenty-three more votes than the incumbent; but the latter claimed in his

answer that the salary of county judge was fixed at \$1000, that relator, being a candidate for the office, published and circulated through the county a promise, addressed to the electors thereof, that if elected county judge he would perform all the duties, and furnish an office, and all other incidentals except the record books, for \$600 per annum during his term, and that solely by this offer, one hundred of the voters of the county were induced to vote for relator, thus securing his election. This was held sufficient on demurrer.

I am unable to distinguish this case in principle from that one. Here, it is true, the result of respondent's action, if he complied with his promise, will not be, as there, the enriching of the county treasury—by refraining from withdrawing therefrom a sum of money, and thereby benefiting, pecuniarily, each taxpayer in the county—but the legal effect of the offer of the respondent is in nowise different; for while he does not propose to enrich the treasury of the county, as in the Wisconsin case, he does propose to impoverish himself, and benefit every suitor who might come before him in his judicial capacity, by diminishing his lawful fees to less than one-half their usual rate. In other words he appealed, and the demurrer admits he was successful in that appeal, not to the fair and honest judgment of the voters touching his qualifications and fitness for the office to which he aspired, but to the cheapness with which he would discharge his judicial duties. He said to the voters in effect and with effect, "Elect me Probate Judge of your county, and no suitor who comes before me shall ever be charged even half the fees which the law allows"—thus making the office which he sought not a matter of qualification, but of bargain and sale. It is not necessary, in this case, to show, as claimed by respondent, that he or those who voted for him, have been guilty of the crime of bribery in its strict sense. In instances involving the freedom and purity of elections, that term possesses a broader significance. As is well said in the case above cited, "It may properly be employed to define acts not punishable as crimes, but which involve moral turpitude, or are against public policy." And there the court held that, though the answer did not contain allegations of fact, showing that the relator, or any of the voters of the county, had been guilty of the criminal offence of bribery, yet that answer was sufficient; and that acts falling short of that crime in its more restricted and technical meaning,

would justify the rejection of votes cast for the party made successful by the employment of the unlawful means. And Hawkins' Pleas of the Crown is quoted from extensively, and fully supports the position taken, where he says:—

“Also bribery sometimes signifies the taking or giving of a reward for offices of a public nature; and certainly nothing can be more palpably prejudicial to the good of the public than to have places of the highest concernment, on the due execution whereof the happiness of both king and people doth depend, disposed of, not to those who are most able to execute them, but those who are most able to pay for them; nor can anything be a greater discouragement to industry and virtue, than to see those places of trust and honor, which ought to be the reward of those who, by their industry and diligence, have qualified themselves for them, conferred on such who have no other recommendation but that of being the highest bidders; neither can anything be a greater temptation to officers to abuse their power by bribery and extortion, and other acts of injustice, than the consideration of the great expense they were at in gaining their places, and the necessity of sometimes straining a point to make their bargain answer their expectation:” vol. I., ch. 27, § 3. Again, the learned author says: “It is of the utmost importance to the public welfare that, in the administration of the government, none but persons competent to perform the duties of their offices should be admitted into any department. But if the sale of offices were allowed to those who have the patronage and appointment, it is evident that there would be the greatest danger of situations being filled, not by those whose talents fitted them for the station, but whose purses enabled them to obtain it. The sale of offices may, therefore, justly be ranked as an offence against the political economy of the state:” vol. I., ch. 32, p. 748.

In *Tucker v. Aiken*, 7 N. H. 140, a similar view was taken, concerning a practice which had obtained of putting up at public auction, and disposing of the office of constable to the highest, and of collector to the lowest bidder, the court there saying in reference to the custom: “It has a tendency to divert the attention of the electors from the qualifications of the candidates, to the terms on which they will consent to serve, and makes the choice turn upon considerations which ought not to have an influence.” The doctrine in that case, so far as concerns public offices, met with approval

in Massachusetts, the court in *Alvord v. Collin*, 20 Pick. 428, saying: "We fully recognise the validity of the objection to the sale of offices, whether viewed in a moral, political or legal aspect. It is inconsistent with sound policy. It tends to corruption. It diverts the attention of the electors from the personal merits of the candidates to the price to be paid for the office. It leads to the election of incompetent and unworthy officers, and on their part to extortion and fraudulent practices to procure a remuneration for the price paid. Nor can we discover a difference in principle between the sale of an office for a valuable consideration and the disposing of it to a person who will perform its duties for the lowest compensation. In our opinion, the same objection lies against both." And the legislature of Massachusetts applied the principle now being discussed in a still more marked manner in the year 1810. The town of Gloucester, though entitled to six representatives, for economical reasons, was accustomed to return but two members whose pay had by law to be furnished by the town. In that year, however, for political considerations, it was deemed desirable that the entire number of representatives to which the town was entitled should be elected. Whereupon several individuals, with a view to induce the town to elect a full delegation, gave a bond for the use of the inhabitants, conditioned that the whole expense of such a representation should not exceed the pay of two members. But it was held by the legislature that the election was void, though none of the members elected from the town had any agency whatever in procuring the execution of the bond. The Supreme Court of Wisconsin, after citing the above and other authorities, say: "The doctrine which we think is established by the foregoing authorities, and which we believe to be sound in principle is, that a vote given for a candidate for a public office in consideration of his promise, in case he should be elected, to donate a sum of money or other valuable thing to a third party, whether such party be an individual, a county or any other corporation, is void."

We must regard the cases above cited as conclusive of this one, and reiterate the statement that the offers in this case made by the respondent differ in no essential particular from the Wisconsin case; the offers in each case were equally deserving of condemnation, and were in spirit and purpose the same. For if bribery in its larger sense, in its application to election cases, is the promise

by the candidate to donate, if elected, a sum of money or other valuable thing to a third party, the promise in the case at bar ought to be held as falling within the same category, since, though the suitors who may have to appear before the candidate when Judge of Probate, cannot in the nature of things be designated, yet the corrupting tendencies of the offer remain the same: remain to swerve the voter from his duty as a citizen, to blind his perception as to the question he should consider, the qualifications of the candidate, and to fix them upon considerations altogether foreign to the proper exercise of the highest right known by freemen—the right of suffrage: a right upon whose absolutely free and untrammelled exercise depends the perpetuity of our republican institutions.

The transaction of which the state in the present instance complains may have been entered into with laudable motives, but it is, as we think has been successfully shown, decidedly demoralizing in its tendencies, and utterly subversive of the plainest dictates of public policy. The maxim in such cases should be *obsta principiis*, and it is only by its rigid observance by the courts that the purity of elections can be preserved. The legislature of this state has, as we are informed, at its last session, enacted a statutory prohibition against the employment in elections of agencies such as have been condemned, thus giving legislative recognition to the principles herein enunciated.

Holding these views, the information will be held sufficient in law, the objections taken thereto by the demurrer not well taken, and the respondent required to plead further.

The crime of bribery is defined by Mr. Bishop in his work on criminal law (vol. 2 § 85), to be "the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done."

It has been held to be indictable to pay or promise to pay money to a voter to vote for a certain candidate at an election: *King v. Cripland*, 11 Mod. 387; *King v. Plympton*, 2 Ld. Raym. 1377; *Commonwealth v. Shaver*, 3 W. & S. 338. See also *Hughes v. Marshall*, 3 Tyrw. 134; 5 C. & P. 150.

See also, as to a promise to pay

money to a voter to go out of town and forbear to vote: *King v. Isherwood*, 2 Keny. Notes of Cases 202. See *Bush v. Ralling*, Sayer 289, which, however, was decided on the Stat. 2 Geo. 2, c. 24, § 7.

So, the sale and purchase of an office of a public nature is considered as a kind of bribery and indictable: Hawk. Pleas of the Crown (8 Lond. ed), Book 1, c. 32, p. 748; *State v. Purdy*, 36 Wis. 213, s. c. 14 Am. Law Reg. (N. S.) 90; *King v. Taggart*, 1 C. & P. 201.

A distinction is, however, taken between the election of public officers, to

whom for the time being the exercise of the functions of sovereignty is intrusted, and the mere choice of a site for a public building ; and bids or pecuniary offers to secure the location of public buildings at some particular place, are upheld as valid : *Dishon v. Smith*, 10 Iowa 212. "The former involves the integrity of the government and the preservation of the principles upon which it is founded, while the latter is only a matter of public convenience or pecuniary interest involving no fundamental principle whatever." *State v. Purdy*, *supra*, per LYON, J.

Whether such a promise as that made in the principal case and in the case of *State v. Purdy*, *supra*, would be indictable, does not appear even to have been decided. The principal case and the case of *State v. Purdy* seem to imply that it would not be indictable. But, as was well observed in *State v. Purdy*

and in the principal case, the term bribery has a more extensive signification than that involved in the use of the same term to designate the crime of bribery in its strict sense, and may properly be employed to define acts not punishable as crimes, but which involve moral turpitude or are against public policy ; and upon this latter ground of opposition to public policy the decisions in those two cases may well be rested. No other cases have been found bearing upon the point directly involved in these two cases ; but they are so well reasoned and the principle of their decision so entirely satisfactory that there would seem to be no need of fortifying them with authorities, and should similar questions arise in the future, they would unquestionably be followed.

MARSHALL D. EWELL.

Supreme Judicial Court of Maine.

SUSAN D. H. BOYD v. SAMUEL L. CARLTON.

In an action of dower, where the husband had conveyed a tract of land, which his grantor subsequently divided and conveyed to several persons, in severalty, the plaintiff is entitled to have her dower set out to her in the parcel described in her writ, according to the present value thereof, excluding the increase in value by reason of improvements made on the same by the defendant or his grantors since the husband aliened the tract of which said parcel is a part ; but not excluding the increased value by reason of improvements made by the owners of the other parcels carved out of the same tract, or by their grantors.

She is entitled to have her dower assigned in the parcel held in severalty by the defendant, precisely as though that parcel had been aliened by the husband as a distinct estate, and by a separate conveyance.

WRIT of dower. The facts sufficiently appear in the opinion.

N. Webb & T. H. Haskell, for the plaintiff.

J. & E. M. Rand, for the defendant.

The general principle we assume to be well settled that the dower must be adjudged according to the value of the land at the

time of the assignment, excluding all increased value from improvements made upon the premises by the alienee, leaving the dowress the benefit of any increase of value arising from circumstances unconnected with these improvements: 1 Wash. R. Prop. (3d ed.) 273, and cases there cited. Or, as this court say in *Carter v. Parker*, 28 Me. 509, such part of the land is to be set out as will produce an income equal to one-third of the income which the estate would have produced if no improvements had been made since alienation.

Of land taken on execution from husband, the wife is dowable, as it existed at time of levy, and not in improvements made after: *Ayer v. Spring*, 9 Mass. 8.

The facts in this case are somewhat peculiar, but do not vary in principle. This land (four acres) was aliened in one piece, and was so held by the alienee for many years. Had it, to the death of the husband, remained in one piece, owned by one person, or by many as tenants in common, and been literally covered with valuable improvements, the law is settled that the dower must be set out, excluding all increased value from improvements. But after the alienation by plaintiff's husband, the tract (the four acres) was divided into some twenty lots, which, during the life of the husband, became the property in severalty of some twenty different owners, and these different owners have each and all made valuable improvements upon their several lots; and now this plaintiff, suing each and all of these several owners, claims against each of them and against his lot, to have the benefit, in the assignment of her dower, of the increased value thereof from all the improvements made upon their several lots by all of the others. Does this subdivision of the lot, originally alienated by the husband, change the principle of law regulating her dower, and give her, in this indirect way, the benefit of the improvements made upon the alienated premises? The subdivision of the lot changes the mode of proceeding to obtain dower, and of setting it out, but not the principle of law governing the assignment. The words, "improvements made upon the premises," as used in the decisions, do not mean improvements made upon the premises demanded in the writ, but improvements made upon the aliened premises.

The opinion of the court was delivered by

BARROWS, J.—The lot in which the plaintiff here demands her

dower is part of a parcel of about four acres of land in Portland, which was owned by the plaintiff's husband during the coverture, until it passed from him in 1841 by the levy of an execution on the entire parcel in favor of the president, directors and company of the Exchange Bank. At the time of the levy there were no buildings on said four-acre parcel; but, a few years later, a street was opened through it, and the remainder was divided into lots of convenient size, one of which is the defendant's, and all of which have passed into the hands of sundry persons holding under sundry mesne conveyances from said bank; and valuable houses have been built upon all of them. The defendant's lot has been improved by filling, draining and fencing, and the erection of a valuable house thereon.

The defendant, not denying the plaintiff's right to dower in this lot, contends that she is entitled to have set out to her only such part thereof as will produce an income equal to one-third of the income which said lot would now produce if no improvements had been made since the levy upon any portion of the tract levied upon.

The plaintiff claims that she is entitled to her dower in the premises described in her writ according to the present value thereof, excluding the increased value by reason of improvements on the same by the successive tenants since the time when her husband aliened the premises, but that she, and not the tenant, is entitled to the benefit of any increased value of the lot by reason of improvements made since the levy on other parcels of the entire four-acre tract.

Both parties accept as correct the general principle as stated in many American cases where dower is awarded against the alienees of the husband or their grantees, and in the text books, substantially thus: The dower is to be assigned according to the value of the lands at the time of the assignment, excluding the increase in value by reason of improvements made on the premises by the alienees, and giving the dowress the benefit of any increase from other circumstances; or, as expressed by this court, by SHEPLEY, J., in *Carter v. Parker*, 28 Me. 509, "The widow is entitled to have such part of the land set out to her as dower as will produce an income equal to one-third part of the income which the whole estate would now produce if no improvements had been made upon it since it was conveyed by the husband."

“She is not entitled to be endowed of improvements made by the grantee of the husband, or by the assignee of such grantee. The widow is to be excluded from the improved value arising from the labor and money expended upon the land since the alienation, but not from that which has arisen from other causes :” *Mosher v. Mosher*, 15 Me. 371.

“The plaintiff is entitled to her dower, excluding in the assignment of it any improvements made by the grantee or his assignee since the alienation :” *Harvey v. Hobbs*, 16 Me. 80.

The contention that arises between the parties is whether expressions like those above quoted from our own decisions apply only to the lot in which dower is demanded in the suit, and is to be set out : or whether, where, as here, the lot is part of a larger parcel aliened by the husband by one conveyance, they exclude all increased value by reason of improvements by other grantees of the alienee on other parts of the parcel.

Such a contention could not arise under the English rule, as laid down by Lord DENMAN in *Riddell v. Gwinnell*, 1 Adol. & El. 682, (41, E. C. L. R. 728), where he discusses at large the ancient authorities, Fitzherbert, and Plowden, and Coke, and concludes that, considering the nature of dower and the remedy provided for it by the law of England, the right unquestionably attaches on all of the lands of which the husband was seised during the coverture, “at the period of his death according to its then actual value without regard to the hands which brought it into the condition in which it is found ; the law apparently presuming that it will continue substantially the same up to the assignment.” He adds, “Mr. Park (on Dower 257) informs us that ‘the understanding of the profession is that the wife shall be endowed of the land as she finds it at the time of her title to dower consummated.’ We have permission from Sir EDWARD SUGDEN, to state that he always considered the rule to be that the widow was entitled to have assigned to her as her dower, so much in value as is equal to a third in value according to the condition of the estate at the time of her husband’s death.” In fine, under Lord DENMAN’S rule, he who builds on land in which there is an outstanding inchoate right of dower finds himself, after the death of the husband, when the dowress comes, in the position of any other man who builds on land to which another has a paramount title.

But in this country, where land is more widely distributed in

small parcels, and changes owners more frequently, the possession of it being less valued and the title less scrutinized than in England, it was long ago felt that such a rule would often produce inequitable and, in some cases, disastrous results; and the common law as held by the courts changed to accommodate itself to the new circumstances. The modification seems to have been adopted for the reasons referred to by PARSONS, C. J., in *Gore v. Brazier*, 3 Mass. 544, prominent among which is the idea that public policy requires it, so that purchasers may not be discouraged from improving their lands.

Widows, whose husbands had aliened with warranty during the coverture, and whose interest in the personalty that might be required to respond for a breach of the warranty was large, would be likely also to adjust their claims, if they made any, upon easy terms, so that neither their children's nor their own share of the personalty would be burdened thereby.

However it has come about, the difference between the American rule and that of Lord DENMAN is well established. The husband, while he has theoretically no control over his wife's right to dower, has it in his power to affect its value by his conveyances; *i. e.*, he may compel her to claim and receive it in many small parcels, the owner of each of which may set out her dower therein, excluding the value of all improvements made thereon by himself or his grantors since the alienation by the husband.

The natural tendency of such alienation under the American rule is to diminish the value of the dower, because there is less probability that the dowress will be able to put many small parcels to the profitable use which she might make of one large one. The question presented in this case, then, is one which is almost sure to arise whenever the husband has aliened without warranty a considerable tract that has been subsequently divided and improved, and it needs careful consideration.

The counsel for the defendant ingeniously argues that the subdivision since the alienation should not affect the general principle, because the dowress will in that way in her various suits indirectly get the benefit of all the improvements made on the four acres, which clearly she could not do if it had remained the property of the original purchaser, and had been improved by him, or by many purchasers as tenants in common; and he claims that, while the subdivision affects the mode of proceeding to obtain the dower and

of setting it out, these are only matters of form, not of substance, and the dowress should be excluded from the benefit of all improvements made on the premises aliened by the husband, as well as those made by the defendant or his grantors, on the premises in which dower is demanded in this writ.

If we were satisfied that the subdivision affected the setting out of the dower in the form only and not in substance, it would go far to show that the governing principle ought not to be changed because of the subdivision after the alienation. But we think this proposition of the defendant cannot be maintained.

As before suggested, dower in a single parcel of four acres, set out, as it ought to be, in one piece, is obviously capable of being used in various ways more profitably than detached pieces of insignificant dimensions, such as the dowress might be obliged to accept when the subdivision has taken place. These last might depend for their value mainly upon the inconvenience to which the occupant of the small lot is subjected by the possession of the dowress, and his ability and willingness to free himself from that inconvenience by payment of a reasonable sum to procure the extinguishment or release of her right. We think there is a substantial difference between the dower in a single four-acre piece and dower in the same when it has been divided into a score of small lots. Moreover, the case finds that, after the parcel went into the hands of the husband's alienee, a street was opened through the tract, preparatory to the subdivision of the remainder. Whether this was by dedication and acceptance does not appear; nor is it material, for, however it was brought about, the effect was to defeat the claim for dower in so much of the four acres as was thus appropriated. 1 Washburn on Real Property (1 ed.), Book 1, c. 7, § 37, p. 220, and cases there cited.

Now, if the husband had aliened in small lots, as the tract is now divided to the several owners, of whom the defendant is one, it would not be contended that the owner of either lot could claim that any improvements, except those made by himself upon his own lot should be excluded from the estimate. We think, for the reasons assigned at large in *Fosdick v. Gooding*, 1 Maine 30, that, since the consequences to the widow in respect of dower must be the same where he aliens to one and the grantee afterwards conveys in several parcels to several, the rule for the assignment should be the same in such case as it would be if the husband had made the division directly.

The acts of the husband which are powerless to defeat, ought not be suffered to impair the value of the wife's dower beyond their necessary results under the American rule. Creditors who take the husband's lands by levy take them subject to the contingency of the wife's claim of dower. Those who derive their title from the levying creditors take it with the same burden as though they derived it directly from the husband by a levy on the parcel which they own. The division by the levying creditors of the tract levied on as the husband's property, and the sale of it to various parties in small lots, and the improvements made by the owners of the other lots must be regarded, if they have tended to enhance the value of the defendant's lot, and consequently of the dower to be assigned therein, as among the "other causes" and "other circumstances" to the benefit of which the dowress is entitled.

The language quoted from the decisions applies only to the lot in which dower is demanded in the suit, and not to other land of the husband, though alienated at the same time and by the same act.

The plaintiff is entitled to have her dower assigned in the lot held in severalty by this defendant precisely as though that lot had been aliened by the husband as a distinct estate and by a separate conveyance.

• Judgment for demandant for her dower accordingly.

RECENT ENGLISH DECISIONS.

Court of Appeal.

BRYANT v. LEFEVRE ET. AL.

The access of air to the chimneys of a building cannot, as against the owner of neighboring land, be claimed either as a natural right of property or as an easement by prescription.

The plaintiff and the defendants were occupiers of adjoining houses, and for more than twenty years the occupiers of the plaintiff's house had enjoyed access of air to the chimneys of it. Subsequently the defendants piled timber on the top of their house so as to overtop the plaintiff's chimneys and cause them to smoke. In an action by the plaintiff to recover damages for the nuisance so caused, *Held*, that the action could not be maintained, either on the ground that an easement had been acquired, or on the ground that the defendants had created a nuisance.

THIS was an action to recover damages for a nuisance caused by the defendants having obstructed the free access of air to the chimneys of the plaintiff's house.

At the trial, before Lord COLERIDGE, C. J., judgment was entered for the plaintiff, and the defendants appealed. The facts and arguments fully appear in the judgments.

Gates, Q. C., and *Edward Clarke*, for the defendants, relied on *Webb v. Bird*, 13 C. B. N. S. 841.

Staveley Hill, Q. C., and *Cock*, for the plaintiff.

BRAMWELL, L. J.—The plaintiff says that he is possessed of a house, that for more than twenty years this house and its occupants have had the wind to blow to, over and from it, and that he has, as so possessed, the right that it should continue to do so; that the defendants have interfered with this right, and prevented the free access and departure of the wind. He adds that they have committed a nuisance to him as so possessed. He has proved that he is possessed of a house more than twenty years old; that the wind had access to it and passage over it for twenty years without the hindrance recently caused by the defendants; that the defendants have caused a hindrance by putting on the roof of their house (which is as old as the plaintiff's), timber to a considerable height, thereby preventing the wind blowing to and over the plaintiff's house when in some directions, and passing away from it when in others; that this causes his chimneys to smoke, as they did not before, to the extent of being a nuisance. The question is if this shows a cause of action.

First, what is the right of the occupier of a house in relation to air independently of length of enjoyment? It is the same as that which land and its owner or occupier have, it is not greater because a house has been built; that puts no greater burthen or disability on adjoining owners. What, then, is the right of land and its owner or occupier? It is to have all natural incidents and advantages as nature would produce them. There is a right to all the light and heat that would come, to all the rain that would fall, to all the wind that would blow—a right that the rain which would pass over the land should not be stopped and made to fall on it; a right that the heat from the sun should not be stopped and reflected on it; a right that the wind should not be checked, but should be able to escape freely. And if it were possible that these rights were interfered with by one having no right, no doubt an action would lie. But these natural rights are subject to the rights of adjoining owners, who, for the benefit of the community, have and must have

rights in relation to the use and enjoyment of their property that qualify and interfere with those of their neighbors—rights to use their property in the various ways in which property is commonly and lawfully used. A hedge, a wall, a fruit tree, would each affect the land next to which it was planted or built. They would keep off some light, some air, some heat, some rain, when coming from one direction, and prevent the escape of air, of heat, of wind, of rain, when coming from the other. But nobody could doubt that in such cases no action would lie, nor will it in the case of a house being built and having such consequences. That is an ordinary and lawful use of property, as much so as the building of a wall or planting of a fence or an orchard. Of course, the same reasoning applies to the putting of timber on the top of a house, which, if not a common is a perfectly lawful act; and it would be absurd to suppose that the defendants could lawfully put another story to their house with the consequences to the plaintiff of which he complains, but cannot put an equal height of timber.

These are elementary and obvious considerations, but, if borne in mind, will assist very materially in the decision of this case.

The plaintiff, then, merely as possessed of land or house, has not the right claimed. But he goes further, and says that the house and its owner and occupiers have had the enjoyment of this benefit for twenty years. He, therefore, relies on that as showing a prescriptive title, or title by lost grant. Whether he has so stated his claim as to raise such a case, it is not necessary to say, for we are of opinion that even if he has, he has not established it; that no such right as he claims can be established by mere enjoyment, without interruption for however long a period. It certainly cannot be claimed under the Prescription Act. Nor can it by lost grant, unless of such a character that it could be claimed by the common-law prescription; for the theory of a lost grant is only applicable to cases where something prevents the application of the common-law prescription. We do not say there might not be an express grant or covenant not to interfere with the passage of air over neighboring property, which could be enforced against the grantor or covenantor, and even against his assigns with notice; whether it could be against his assigns without notice it is not necessary to say. But the lost grant doctrine is ancillary to the common-law prescription doctrine. Can this right then be claimed under that? Now, certainly the land as such has enjoyed this as

of right for all time—since the sun first shone and the wind first blew, and it is not a case of twenty, or any finite number of years. But that enjoyment is the result of the natural right of which we have spoken, and not of an acquired right. Then, does the existence of a house on the land for twenty years make any difference? None. The owner of the land enjoyed the free passage of the air over his land when it was a field, subject to the right of his neighbors to build on their own land, or to do on their own land any lawful act. He now enjoys it over his land with a house on it, subject to the same rights. If the house on his land is less commodious, by reason of any lawful act of his neighbor done on the adjoining land, then, to use the expression of the judges in *Bury v. Pope*, Cro. Eliz. 118, “it was his folly to build his house so near to the other’s land.”

It may be said that if this reasoning is correct it is applicable to lights. So it is to a great extent; and any one who reads the cases relating to the acquisition of a right to light will see that there has been great difficulty in establishing it on principle. Mr. Justice WILLES says it is anomalous: *Webb v. Bird*, 10 C. B. N. S. 285; and per Mr. Justice BLACKBURN, 13 C. B. N. S. 844. In the case referred to of *Bury v. Pope*, it was held that where there are owners of adjoining pieces of land, and one builds a house, and for thirty or forty years has access of light to it, yet the other may build a house adjoining and shut out the light. This shows the general principle, though the law as to light is now different as a right is gained to it by enjoyment. But there is this difference between this claim and the claim to light: The right in that case is always limited to the particular window or aperture through which the light and air have had access. It is one, therefore, against which an adjoining owner can defend himself by blocking it up within the period necessary for the gaining of a right. Lord WENSLEYDALE thought this a very strong thing as a great burden on the adjoining landowner: *Chasemore v. Richards*. But here the claim is of such a character that its enjoyment could only be prevented by surrounding the land with erections as high as it might at any time be wanted to build on the land. The principle of *Chasemore v. Richards*, 7 H. L. Cas. 349, is applicable, namely, that the right claimed is not one the law allows, being too vague and uncertain, one the acquisition of which the adjoining owner could not defend himself against, and that the remedy of

the plaintiff in such a case as this is to build higher, as in such a case as that it was to dig deeper.

We are of opinion that on principle the plaintiff fails to make out his right as claimed. The authorities are to that effect. *Webb v. Bird*, 10 C. B. N. S. 268; 13 C. B. N. S. 841, is really in point. It is true that in that case the mill appeared to have been built in 1829. I believe the date of the building of the plaintiff's house in this case did not appear; it will hardly be supposed to be one hundred years old. But the reasoning in that case would be equally applicable to a claim by prescription from time whereof the memory of man runneth not to the contrary, if the date of the building of the plaintiff's house could not be shown. It is really hardly necessary to notice the other cases, which are sufficiently dealt with by the judges in *Webb v. Bird*. We may, however, mention *Roberts v. Macord*, 1 Moo. & R. 230, where Mr. Justice PATTESON was of opinion that a claim like the present could not be supported. All the reasoning and all the considerations that prevailed in *Chasemore v. Richards*, are opposed to it. Where it has been said that there is a right to air there is good ground for supposing that the wholesomeness of the air has been interfered with, or that there was some peculiarity in the land or building which made the air necessary in a definite place. We are of opinion, then, that the action cannot be maintained on this ground.

But it is said, and the jury have found, that the defendants have done that which has caused a nuisance to the plaintiff's house. We think there is no evidence of this. No doubt there is a nuisance, but it is not of the defendants' causing. They have done nothing in causing the nuisance. Their house and their timber are harmless enough. It is the plaintiff who causes the nuisance, by lighting a coal fire in a place the chimney of which is placed so near the defendants' wall that the smoke does not escape, but comes into the house. Let the plaintiff cease to light his fire, let him move his chimney, let him carry it higher, and there would be no nuisance. Who, then, causes it? It would be very clear that the plaintiff did, if he had built his house or chimney after the defendants had put the timber on theirs, and it is really the same, though he did so before the timber was there. But (what is in truth the same answer) if the defendants cause the nuisance, they have a right to do so. If the plaintiff has not the right to the passage of air, except subject to the defendants' right to build or

put timber on their house, then his right is subject to their right, and though a nuisance follows from the exercise of their right, they are not liable. *Sic utere tuo ut alienum non lædas* is a good maxim. But, in our opinion, the defendants do not infringe it. The plaintiff would, if he succeeded. We are therefore of opinion, that judgment should be for the defendants.

COTTON, L. J.—This is an appeal of the defendants from so much of a judgment of Lord COLERIDGE in favor of the plaintiff as was given in respect of the interruption of air to the plaintiff's chimney, caused by the defendants. The jury have found—1. That there had been for more than twenty years free access of air to the chimneys of the plaintiff's house; 2. That the defendants interfered with it; 3. That the erection of the defendants' wall sensibly and materially interfered with the comfort of human existence in the plaintiff's premises; 4. That the plaintiff sustained damage—40*l.* by the building of the defendants' wall, and 20*l.* by falling of timber and other matters from defendants' stacks, on the plaintiff's premises.

The first question is, whether the plaintiff has, either as a natural right of property or as an easement, a right as against the defendants to have the access of air to his chimney without any interruption by the defendants. In my opinion, he has no such right.

In my opinion, it would be a contradiction in terms to say that a man has a natural right against his neighbors in respect of a house which is an artificial addition to, and not a user of, the land. That the owner of a house has, as against his neighbor, no natural rights in respect of his house, is shown by the cases as to subjacent and lateral support. These show that while every owner of property has, independently of user, a natural right to support for his land, if he adds buildings to his land, and thereby requires an increased support, he, in the absence of express grant, can only acquire a right to such support by user, that is, by way of easement.

The right (if any) of the plaintiff to the uninterrupted flow of air to his chimney must therefore be by way of easement. Cases to prevent, or claim damages for interference with ancient lights, are frequently spoken of as cases of light and air, and the right relied on as a right to the access of light and air. But this is inaccurate. The cases, as a rule, relate solely to the interference with the access of light, and in no case has any injunction been

granted to restrain interference with the access of air. It is unnecessary to say whether, if the uninterrupted flow of air through a definite aperture or channel over a neighbor's property, has been enjoyed as a right for a sufficient period, a right by way of easement could be acquired. No such point is made in this case; and I am of opinion that a right by way of easement to the access of air over the general unlimited surface of a neighbor's property, cannot be acquired by such enjoyment. For this *Webb v. Bird* is an authority. As the last decision in that case was in the Exchequer Chamber, it would be sufficient to rely upon the authority of that case. But I think it better to say that I entirely agree with that decision, and with the reasons given in this case by Lord Justice BRAMWELL.

In my opinion, therefore, the plaintiff has no right in respect of the flow of air to or from his chimney. Every man has a natural right to enjoy the air pure and free from every noxious smell or vapors, and any one who sends on to his neighbor's land that which makes the air there impure, is guilty of a nuisance. Here it is found that the erection of the defendant's wall has sensibly and materially interfered with the comfort of human existence in the plaintiff's house, and it is said that this is a nuisance for which the defendants are liable. Ordinarily this is so; but the defendants have done so not by sending on to the plaintiff's property any smoke or nauseous vapor, but by interrupting the egress of smoke from the plaintiff's house in a way to which, as against the defendants, the plaintiff has no legal right. The plaintiff creates the smoke which interferes with his comfort. Unless he has as against the defendants a right to get rid of this in the particular way which has been interfered with by the defendants, he cannot sue the defendants because the smoke made by himself, for which he has not provided any effectual means of escape, causes him annoyance. As if a man tried to get rid of liquid filth arising on his own land by a drain into his neighbor's land, until a right had been acquired by user, the neighbor might stop the drain without incurring liability by so doing. No doubt great inconvenience would be caused to the owner of the property in which the liquid filth arises; but the act of his neighbor would be a lawful act, and he would not be liable for the consequences attributable to the fact that the man had accumulated filth without providing any effectual means of getting rid of it.

I am of opinion that so much of the judgment as is appealed from must be reversed.

BRETT, L. J., agreed.

Here we have another proof that the American courts, and not the English, have adopted the true doctrine in regard to the acquisition of a right to light, by what is called a prescriptive enjoyment of it; for in all analogous instances the English courts themselves act upon the same rule which we apply to a claim of a right to light. All the arguments in favor of establishing a right to light by long use of it apply equally in favor of acquiring a right to air by the same length of enjoyment; all the considerations against gaining the rights in the latter case are equally forcible in the former. It is impossible to be acquiring prescriptive rights against another by a series of acts, or a long continuation of enjoyment which the other party has no legal right to complain of, or prevent by any known legal remedy. The very foundation of a prescriptive right—the most essential of all others—the *adverse*

use, is wanting. If a person can not acquire by prescription a right to a continued flow of air to his windmill, as decided in *Webb v. Bird*, nor to a free current of air to his chimney-tops, as held in our principal case, how can he any more gain such right to a continued flow of light into his windows?

If a house-owner can not acquire by any length of time a prescriptive right to support from his adjoining neighbor's soil, as held in *Angus v. Dalton*, 17 Am. Law Reg. 645, why should he be allowed to do so by mere overlooking his neighbor's ground? The argument of Chief Justice COCKBURN, in *Angus v. Dalton*, is unanswerable, and, although a majority of the judges in the Court of Appeal did not agree with it (see 27 Weekly Rep.) it remains to be seen whether it will not be finally held to be the common law of England.

EDMUND H. BENNETT.

ABSTRACTS OF RECENT DECISIONS.

ENGLISH COURTS OF EQUITY.¹

SUPREME COURT OF ILLINOIS.²

COURT OF CHANCERY OF NEW JERSEY.³

SUPREME COURT OF VERMONT.⁴

AGENT. See *Broker*.

ATTORNEY.

Authority to receive Money for Client—Possession of Mortgage-Deed executed by Client.—The mere fact that a solicitor is in possession of a mortgage-deed executed by his client, does not authorize him to receive the mortgage-money for the client; *Ex parte Swinbanks*, Law Rep. 11 Ch. Div.

¹ Selected from recent numbers of the Law Reports.

² From Hon. N. L. Freeman, Reporter; to appear in 89 Ills. Rep.

³ From John H. Stewart, Esq., Reporter; to appear in 31 N. J. Equity Rep.

⁴ From J. W. Rowell, Esq., Reporter; to appear in 51 Vt. Rep.

If the client has not received the money, the mortgagee cannot maintain the validity of the mortgage-deed, by showing that he paid the money to the solicitor, unless he can show that the solicitor was expressly authorized by the client to receive it: *Id.*

Viney v. Chaplin, 2 DeG. & J. 468, followed. *Barker v. Greenwood*, 2 Y. & C., Ex. 414, distinguished: *Id.*

BANK AND BANKER.

Agent—Following Money—Priority.—A banking company were employed as agents to collect money and to remit it to their employers. The bank received the money in cash, placed it with the other cash of the bank, and informed their employers that the money had been remitted; but before the money was actually remitted, the bank went into liquidation: *Held*, that the money was part of the general assets of the bank, and that the employers of the bank were not entitled to be paid, in priority to the other creditors: *In re West of England and South Wales District Bank*, Law Rep. 11 Ch. Div.

Pennell v. Deffel, 4 D. M. & G. 372, considered: *Id.*

BROKER.

Finding a Purchaser—Specific Performance—Agent.—A person was employed to find a purchaser for a piece of property, the price to be fixed by the vendor. Having found a purchaser, with whom the vendor agreed as to the price; *held*, that the conduct of the agent having been fair, no further duty was imposed upon him in the matter, by reason of such special, qualified agency: *Hughes v. Young*, 31 N. J. Eq.

The purchaser was to give a mortgage for part of the purchase-money. He offered to pay the whole in cash, if desired. *Held*, that, under the circumstances, the fact of his insolvency would not avail as a defence against specific performance: *Id.*

The buyer did not disclose the fact that he was, in fact, purchasing for another person. *Held*, that he was under no duty to disclose his principal: *Id.*

CLUB.

Power of Expulsion—Rights of Member—Misconduct—Injunction.—The committee of a club, being a quasi-judicial tribunal, are bound in proceeding under their rules against a member of the club for alleged misconduct, to act according to the ordinary rules of justice, and are not to convict him of an offence warranting his expulsion from the club, without giving him due notice of their intention to proceed against him and affording him an opportunity of defending or palliating his conduct; and the court will, at the instance of any member so proceeded against, restrain the committee by injunction from interfering with his rights of membership: *Fisher v. Keane*, Law Rep. 11 Ch. Div.

COMMON CARRIER. See *Stoppage in Transitu*.

Limitation of Liability.—The right of a carrier to limit its common-law liability by contract, if made fairly and advisedly on behalf of the shipper cannot be denied; but the mere fact that the bill of lading given, contains a clause exempting the carrier from the loss of goods by fire, cannot be held conclusive of such a contract: *Merchants' Desp. Trans. Co. v. Leysor*, 89 Ills.

CORPORATION.

Liability of a Corporation in the Hands of Trustees.—Where a railroad is in the hands of trustees exercising the same function the corporation is formed to exercise, and who were selected by the corporation as well as its bondholders, and are operating the road to earn money to be applied in payment of the debts of the corporation, the trustees will be regarded as the agents of the corporation, so far as relates to the transaction of business with third persons, and such persons may sue the corporation and recover damages in respect to transactions had with such trustees, and will not be compelled to sue the trustees: *Grand Tower Manf. Co. v. Ullman*, 89 Ills.

Garnishment of a Stockholder.—A stockholder in an incorporated company, who owes the company for unpaid stock, upon which a call has been made and notice given, is liable to be garnisheed on a judgment recovered against the company: *Meints v. East St. Louis Rail Mill Co.*, 89 Ills.

DEED.

Rectification of in Equity—Mistake.—Relief prayed by a bill to rectify a deed, whereby through the mutual mistake of the parties, a lot of land was conveyed instead of an adjoining one, can only be granted by transferring to such adjoining lot the encumbrances put on the former by the parties: *Weston v. Wilson*, 31 N. J. Eq.

DOWER.

Right as against Heir taking by Deed—Measure of Value where Improvements made.—There is no difference in the legal effect of a conveyance to a stranger for a valuable consideration and one to a child for a good consideration, as regards the right of the grantor's widow to dower in the premises conveyed. In assessing the value of her dower, in such case, she will be confined to the improvements on the land, at the time of the conveyance, although after the conveyance, the grantor may have erected a house on the premises with his own means: *Stookey v. Stookey*, 89 Ills.

EQUITY. See *Deed*.

Practice—Cross-Bill.—A cross-bill is not necessary in a suit between partners, wherein the complainant seeks a dissolution and an account from the defendant, to enable the latter to get an account from the former, or to obtain relief against fraudulent practices of the complainant in giving the note of the firm without consideration, for his own benefit, and in buying up the paper of the concern at a discount, for his advantage, with a view to obtaining the full amount thereof out of the assets of the firm. Such a bill will not be sustained on demurrer: *Johnson v. Buttler*, 31 N. J. Eq.

EXECUTOR AND ADMINISTRATOR. See *Sale*.

Trustee Process Summoning Administrator.—An administrator holding money, proceeds of a settled estate, is chargeable as trustee of one entitled thereto in distribution of such proceeds, on trustee process summoning him in his personal and not in his representative capacity: *Hoyt v. Christie*, 51 Vt.

GUARANTY.

Absolute undertaking—Surety.—B. sold certain property to W., taking W.'s notes therefor, signed by W. and by H. as surety, agreeing that if W. should sell the property, the indebtedness might be transferred to his purchasers. W. sold the property to L. and E., they agreeing to assume his indebtedness. B. met the parties pursuant to a notice from S. W., who acted in that matter as agent for W., and was asked to transfer the debt. He suggested that as it would take some time to compute the notes, it would be as well for L. and E. to assume the debt by writing on the notes themselves, to which all assented, whereupon L. and E. wrote on the back of each note, "We hereby assume and agree to pay this note." and dated and signed the same. S. W. then understood that L. and E. had assumed the debt absolutely, and that the signers of the notes were relieved from further liability. B., when afterwards inquired of by the defendants, said, in effect, that the defendants need have no concern, as the debt was that of other parties. *Held*, that the undertaking of L. and E. was absolute; and that as the contract to substitute the indebtedness of L. and E. for that of H. and W. was executed in a manner satisfactory to B., H. and W. were relieved from all liability on account of the original indebtedness: *Nelson v. Wells*, 51 Vt.

HUSBAND AND WIFE.

Wife's Chose in Action—Reduction into Possession—Receipt by Agent of Husband and Wife.—The receipt by an agent, appointed by husband and wife, of money forming part of the estate of an intestate of which the wife is administratrix, amounts to a reduction into possession by the husband of the wife's distributive share of the money. *Huntley v. Griffith*, F. Moore 452; *Goldsborough* 159, followed: *In re Barber*, Law Rep. 11 Ch. Div.

INFANT.

Contract—Fraudulent Representations.—Plaintiff, falsely representing himself to be of full age, bought a wagon of defendant, paying part of the purchase-money, and giving his promissory note secured by a lien on the wagon for the remainder. After plaintiff had used the wagon until the use he had had of it was worth more than what he had paid, and until it had depreciated by more than a like sum, he made default in payment, whereupon defendant took the wagon under his lien, and sold it at auction. Plaintiff thereupon brought assumpsit for the money he had paid. *Held*, that as defendant retook the wagon, plaintiff was relieved of the duty of returning it or rescinding the contract, and might recover, notwithstanding the depreciation and the value of the use of the wagon; and that it made no difference that plaintiff falsely represented himself of age, as such a representation could add nothing to the obligation of the contract: *Whitcomb v. Joslyn*, 51 Vt.

INSURANCE.

Proposal for Policy on Life—Concealment.—In a proposal by M. to an assurance office for an assurance on his life, in answer to the question, "Has a proposal ever been made on your life at any other office or offices? If so, where? Was it accepted at the ordinary premium, or at an increased premium, or declined?" his answer was, "Insured now

in two offices for 16,000*l.* at ordinary rates. Policies effected last year." The proposal was accepted, but the office having subsequently ascertained that the life of M. had been declined by several offices: *Held*, that there had been a material concealment, and that the office was entitled to have the contract set aside. *London Assurance v. Mansel*, Law Rep. 11 Ch. Div.

LEGAL REPRESENTATIVES.

Term defined.—The term "legal representatives," in its strict and literal acceptation, means executors or administrators, but it is frequently used in a different sense, even in statutes, as well as in wills, deeds, contracts, &c., and, therefore, the question of intention is to be considered in its construction—not gathered solely from the instrument itself, but, in part from concomitant circumstances, and the existing state of things, and the relative situation of the parties to be affected by it: *Bowman v. Long*, 89 Ills.

LIMITATIONS, STATUTE OF.

Evidence—Burden of Proof.—In debt on judgment of a court of another state rendered more than eight years before action brought, defendant gave notice of reliance on the Statute of Limitations, and on the fact that during more than eight years of that time he had resided in this state and had known attachable property therein. *Held*, that the allegation as to residence and the possession of property was surplusage as part of the defence, and needed not to be proved; and that the burden was on plaintiff to prove whatever he relied on to show that the statute had not run: *Copen v. Woodrow*, 51 Vt.

SALE. See *Stoppage in Transitu*.

Executor's Sale—Caveat Emptor.—In the absence of actual fraud on the part of an executor to induce the purchase of land of his testator, the rule of *caveat emptor* applies in all its strictness. The general rule is, that in such sales a purchaser taking no covenants to cover defects in title, is absolutely without relief, unless a fraud has been practised upon him, sufficient to vitiate the contract: *Bond v. Ramsey*, 89 Ills.

SHERIFF'S SALE.

If requirements substantially complied with Purchaser will take Title.—Where the proceedings of an officer on an execution are in substantial compliance with the law, and operate by their legal force, unaided by any consent of the judgment-debtor, to transfer to the purchaser the title of the property sold thereunder, the sale though somewhat informal and defective, is a good sheriff's sale, and will protect the purchaser in his right to the property without a change of possession: *Fitzpatrick v. Peabody*, 51 Vt.

SPECIFIC PERFORMANCE. See *Broker*.

STOPPAGE IN TRANSITU.

End of Transit—Delivery to Purchaser—Contract to deliver Goods free on board Ship to be named by Purchaser.—Delivery of goods by the vendor to a carrier, even though the carrier be nominated and hired by the purchaser, is only constructive, not actual delivery to the pur-

chaser, inasmuch as the contract with a carrier to carry goods does not make the carrier the agent or servant of the person with whom he contracts: *Ex parte Rosevear Clay Co.*, Law Rep. 11 Ch. Div.

Till the goods are in the actual possession of the purchaser the transit is not at an end, and it makes no difference that their ultimate destination has not been communicated by the purchaser to the vendor: *Id.*

SUBROGATION.

Volunteer Creditor.—A mere stranger or volunteer cannot, by paying a debt for which another is bound, be subrogated to the creditor's rights in respect to the security given by the real debtor, but if the person who pays the debt is compelled to do so for the protection of his own interests and rights, then the substitution should be made: *Young v. Morgan*, 89 Ills.

TRUST AND TRUSTEE.

Discharge of Trustee—Unwillingness to Act.—A trustee is at liberty to apply to this court for his release from the trust, on the sole ground of unwillingness to act further therein: *Green v. Blackwell*, 31 N. J. Eq.

The fact that he is one of two trustees, and that the deed of trust provides that, in case of the death of one, the survivor shall nominate, and with the consent and approbation of the parties to the settlement or the survivors or survivor of them, appoint a new trustee in the place of the one who has died, will not induce the court to refuse the release. The court will supply the place of the trustee released: *Id.*

That a very large and unexpected addition to the trust estate has been made, is in itself, a good reason for releasing an unwilling trustee: *Id.*

TRUSTEE PROCESS. See *Executor*.

USURY.

Who may raise the Question.—The right of action to recover for money paid as usury is personal to the contracting party. The purchaser of property subject to a mortgage given to secure notes drawing usurious interest, who assumes to pay such notes, cannot, therefore, recover money paid for such interest thereon: *Spaulding v. Davis*, 51 Vt.

VENDOR AND PURCHASER.

Rescission for Fraud.—To resist the payment of the purchase-money of land for fraud, the purchaser must elect to rescind the contract, and it is doubtful whether his grantees after his death can reconvey the property so as to work a rescission of the contract and enable him to resist payment: *Bond v. Ramsey*, 89 Ills.

WILL.

Devises and Descent regulated by Statute.—The rules providing for the descent of property have their origin in municipal regulation, and so too the power to dispose of property by will is conferred by statute, and may be curtailed or enlarged from time to time as the legislative department may deem wise and for the best interest of the people: *Emmert v. Hays*, 89 Ills.

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ABANDONMENT. See **EASEMENT**, 1.

ABATEMENT.

A proceeding in the county court to compel a guardian to account, abates on the death of the guardian. *Harvey v. Harvey*, 262.

ACCOMPLICE. See **CRIMINAL LAW**, 27, 28.

ACCOUNT. See **EQUITY**, 7, 39; **LIMITATIONS**, **STATUTE OF**, 2, 15, 16, 17; **PARTNERSHIP**, 6, 22, 23, 24.

1. Decree denied where complainants' laches has rendered it impossible to do justice to both parties. *Sout v. Ex'rs of Seabrook*, 198.

2. If the court is satisfied that nothing is due complainant a dismissal must be directed. *Id.*

3. Where defendant admits his indebtedness, but sets up that a judgment-creditor of the plaintiff has a suit, in which such indebtedness is sought to be subjected to the payment of his judgment: *Held*, that it is error to render judgment until such judgment-creditor is made a party. *Benson's Adm. v. Stein*, 451.

4. But where the judgment is rendered, the error is cured whenever it is made to appear of record that the action of the judgment-creditor has been dismissed. *Id.*

5. Where the defendant answers that the amount due plaintiff has been fixed by an award, and the plaintiff replies, admitting the award, and asks judgment thereon, there is no such departure in pleading as will vitiate a judgment for the amount admitted to be due. *Id.*

ACCRETION. See **RIPARIAN RIGHTS**, 1.

ACKNOWLEDGMENT. See **DEED**, 3

ACTION. See **ADMIRALTY**, 4; **ASSUMPSIT**, 1; **ATTORNEY**, 3; **INSURANCE**, 1; **MORTGAGE**, 19; **NUISANCE**, 4, 8; **PARTNERSHIP**, 9; **STATUTE**, 6.

1. Where the charter of a bank rendered the persons and property of the stockholders liable for the redemption of the bank bills in proportion to their stock, such liability can be enforced by a separate action against a stockholder by a billholder. *Mills v. Scott*, 518.

2. Debt will lie where the bank's indebtedness and the number of shares held by the stockholder can be stated. *Id.*

3. Debt will always lie where the amount sought to be recovered is certain or can be ascertained from fixed data by computation. *Id.*

4. If a man knowingly plant, and suffer to grow over the land of his neighbor a noxious tree, by which his neighbor's cattle are injured, an action will lie against him by such neighbor. *Crowhurst v. Burial Board*, 348.

5. Limits of the doctrine *sic utere tuo ut alienum non lædas*, discussed. *Id.* *Note.*

6. A man promised certain stockholders to pay the debts of the corporation, in consideration of a transfer of stock to him. Failing to pay a certain debt he was sued in assumpsit by the creditor upon an assignment of this agreement. *Held*, that the action did not lie since plaintiff's interest could not be ascertained at law. *Pratt v. Bates*, 586.

ACTION.

7. No action lies for the breach of a promise to marry made by a person incurably impotent. *Gulick v. Gulick*, 583.
8. Suit may be brought to recover money unlawfully exacted under stress of legal process. *People v. East Saginaw*, 451.
9. A railroad, by whose direction a contractor enters upon land which it has acquired, subject to an existing lease, is liable as a joint-tortfeasor with the contractor for damages to the crops of the lessee. *Ullman v. Hannibal & St. Joseph Railroad Co.*, 63.

ACTS OF CONGRESS.

- 1853, Feb. 26. See BANKRUPTCY, 7.
- 1863, See EVIDENCE, 12.
- 1866, July 18. See STATUTE, 6.
- 1866, July 26. See MINES AND MINING, 1.
- 1872, May 10. See MINES AND MINING, 6.
- 1874, Revised Statutes.
 - Sect. 3082. See STATUTE, 7.
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 - Sect. 5117. See BANKRUPTCY, 8.
 - Sect. 5278. See EXTRADITION, 1.
- 1875, March 3. See REMOVAL OF CAUSES, 1.

ADMINISTRATOR. See EXECUTOR.

ADMIRALTY. See SHIPPING; NEGLIGENCE, 8, 9, 11, 12.

I. Collision.

1. Rule 22 of § 4233 of the U. S. Revised Statutes, directing that a vessel overtaking another vessel shall keep out of the way, applies until the overtaking vessel has completely passed the other. *Kennedy v. American Steamboat Co.*, 656.
2. A packet conveying mails and carrying on commerce, although belonging to the sovereign of a foreign state, is not exempt from process of law, nor can the crown clothe such vessel with the immunity of a foreign ship of war. *The Parlement Belye*, 726.

II. Liability of Shipowners. See *infra*, 4.

III. Maritime Lien.

3. Proceedings *in rem* are exclusively cognizable in admiralty, and the question whether a case is made for the recall of property released under bond, must be determined by the courts empowered to hear the pending suit. *United States v. Ames*, 517.
4. An action *in rem* may be sustained to recover damages for the death of a person caused by negligence. *Rusk v. Steamboat*, 624 and *Note*.

IV. Salvage.

5. A tug is not entitled to salvage for rescuing a ship from danger brought about by the tug's negligent performance of a contract to tow the ship. *The Robert Dixon*, 726.

ADMISSION. See EVIDENCE, 11; TRIAL, 1.

AGENT. See BANK AND BANKER, 1; BILLS AND NOTES, 1; BROKER, 1, 2; CONTRACT, 9, 11; CORPORATION, 10; HUSBAND AND WIFE, 41; INSURANCE, 7, 13, 14; MUNICIPAL CORPORATION, 3; RAILROAD, 1; UNITED STATES, 3.

1. Where either a public or private agent is clothed with general powers, the means and measures necessary to carry them into effect are also granted. *State ex. rel., &c. v. Gates*, 62.
2. Where a son is suffered to act as a general agent for his father, the public will be justified in assuming that he possesses all the powers of a general agent. *Thurber v. Anderson*, 583.
3. An agent to pay money, cannot retain it on the ground that his principal's contract to pay was illegal. *Kiewert v. Rindskopf*, 656.
4. Payments to an agent bind the principal, where the agent is authorized

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to receive the money, either by express authority, by the usage of trade, or by the dealings of the parties. *Noble v. Nugent*, 727.

ALIEN. See **INTERNATIONAL LAW**, 1, 2; **LAND**, 1.

ALIMONY. See **CONTEMPT**, 1; **HUSBAND AND WIFE**, 33, 34, 35.

AMENDMENT. See **CRIMINAL LAW**, 1.

ANIMALS. See **NEGLIGENCE**, 23, 27.

APPLICATION OF PAYMENTS. See **GUARANTY**, 4; **NATIONAL BANK**, 5.

ARBITRATION.

The power of a court with the consent of the parties to refer a case to arbitrators, is incident to all judicial administration where the right exists to ascertain the facts as well as the law. *Newcomb v. Wood*, 199.

ARREST.

Manual touching of the body not necessary to constitute an arrest in a civil action. *Richardson, Ex'r v. Rittenhouse*, 130.

ASSAULT AND BATTERY. See **TRESPASS**, 1; **VERDICT**, 1, 2.

ASSIGNMENT. See **DEBTOR AND CREDITOR**, 9, 10, 11; **PARTNERSHIP**, 10; **PLEADING**, 3.

1. A claim against the United States, before it is allowed, cannot be assigned. *Spafford v. Kirk*, 124.

2. Any writing, clearly appropriating a fund or property to a person, is esteemed in equity an assignment. *Bower v. Stone Co.*, 198.

ASSUMPSIT. See **ACTION**, 6; **MORTGAGE**, 19.

1. A verbal agreement made at the time of the execution of a deed for land that if a survey should show more acres than mentioned in the deed, the vendee should pay for the excess, may be shown by parol and enforced. *Ludeke v. Sutherland*, 125.

2. When the assignee of a purchaser sells the land and then is compelled to pay the original vendor more than is due him, in order to get a deed to satisfy his vendee, and the payment is made under protest, it is a question for the jury whether the payment is not involuntary, and if so, the excess may be recovered back in assumpsit under the common counts. *Pemberton v. Williams*, 262.

ATTACHMENT. See **ACCOUNT**, 3; **BILLS AND NOTES**, 13; **EXECUTOR**, 4. **RECEIVER**, 2, 6; **REPLEVIN**, 1.

1. Cannot be made to operate on a merely legal title where plaintiffs have or are bound to take notice of the equitable title. *Tucker v. Vandermark*, 335.

2. Money paid into court is not liable to attachment. *Mattingly v. Grimes*, 388.

3. A stockholder who owes a corporation for unpaid stock upon which a call has been made, may be garnished on a judgment against the corporation. *Meints v. Mill Co.*, 789.

ATTORNEY. See **CRIMINAL LAW**, 10; **EVIDENCE**, 29.

1. The privilege of admission as an attorney in the courts of Maryland is limited to white male citizens above the age of twenty-one years. *In re Charles Taylor*, 388.

2. The privilege of admission as an attorney is not a right within the meaning of the fourteenth amendment of the constitution of the United States, but is governed and regulated by the legislature. *Id.*

3. Counsel fees cannot be recovered by action, unless a contract fixing the amount can be shown. *Hopper v. Ludlum*, 727.

4. The mere possession of a mortgage-deed does not authorize a solicitor to receive the mortgage-money for his client. *Ex parte Swinbanks*, 787.

5. In such case, if the client does not receive the money, the mortgagee

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cannot recover without showing that the solicitor was expressly authorized. *Ex parte Scinbanks*, 787.

6. *Viney v. Chaplin*, 2 DeG. & J. 468, followed. *Barker v. Greenwood*, 22 Y. & C., Ex. 414, distinguished. *Id.*

ATTORNEY-GENERAL. See CONSTITUTIONAL LAW, 32; CORPORATION, 5; EQUITY, 25.

AUCTIONEER. See CONSTITUTIONAL LAW, 2.

BAILMENT. See EQUITY, 15; NEGLIGENCE, 28; REPLEVIN, 1.

1. A. endorsed a note for W.'s accommodation. W. pledged it to P. for a debt, and subsequently paid the debt, but wrote to P. asking him to give time on another debt due from W., and to hold this note as collateral. A. was secured for his endorsement. In an action by P. against A.: *Held*, that W.'s letter was an actual pledge and not a mere offer: *Held further*, that P. could recover. *Providence Thread Co. v. Aldrich*, 727.

2. Delivery of railroad receipts by a purchaser of grain to the seller as security for the price is a symbolical delivery of the grain. *Taylor v. Turner*, 125.

BANK AND BANKER. See ACTION, 1, 2; CORPORATION, 4; PARTNERSHIP, 9.

1. A bank collected money as an agent, placed it with their own moneys, and wrote to their employers that they had remitted it. Before it was actually remitted the bank failed: *Held*, that the money was part of their general assets. *In re West of England, &c., Bank*, 788.

2. *Pennell v. Deffell*, 4 D., M. & G. 372, considered. *Id.*

BANKRUPTCY. See ERRORS AND APPEALS, 2; SET-OFF, 3.

I. Effect of Proceedings.

1. District Courts have no power, under section 25 of the Bankrupt Act, to order, in a summary way, a sale of an estate claimed by the assignee, but in the possession of a third person claiming adversely. *Gifford v. Helmes*, 125.

2. Courts of Bankruptcy may exercise, in a summary way, and with notice to the parties, many of the powers conferred by section 1 of that act. *Id.*

3. The power given to the Circuit Court by section 2 of the act, to revise such cases arising in the District Court, does not extend to any case where special provision for revision is otherwise made. *Id.*

4. Creditors cannot reach property fraudulently conveyed, except through the assignee. *Glenny v. Langdon*, 126.

5. In such case if the assignee will not sue, the court may direct him to proceed, or may authorize the creditors or the bankrupt to sue in his name upon indemnifying him against costs. *Id.*

6. A claim against the government for cotton captured by the United States forces, and sold, passes to an assignee in bankruptcy, though from the bar of the statute the claim be not enforceable by legal proceedings. *Erwin v. The United States*, 262.

7. The Act of Congress of February 26th 1853, to prevent frauds upon the treasury, does not embrace the passing of claims to heirs, devisees or assignees in bankruptcy. *Id.*

II. Fraud.

8. Fraud, as used in section 5117 of the Revised Statutes, means positive and not implied fraud. *Wolf v. Stiz*, 518.

9. It does not include such fraud as the law implies from the purchase of property from a debtor with the intent to hinder and delay his creditors. *Id.*

10. The purchaser in such case is not liable to pay to creditors the value of what he buys. All the risk he runs is that the sale may be avoided and the property reclaimed for the benefit of creditors. *Id.*

11. To come within this exception in the Bankrupt Act, the debt must be created by fraud. *Id.*

III. Assignee. See *supra*, 4, 5, 6.

12. A debtor made an assignment for the benefit of creditors and afterwards paid money to a creditor. Subsequently, under proceedings in bankruptcy,

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a trustee was appointed who filed a bill and set aside the assignment, and who, more than two years after his appointment, sued the creditor for the money, on the ground that it belonged to the assignee. *Held*, that the cause of action had not accrued to the plaintiff until the assignee's title had vested in him under his bill in equity. *Tappan v. Whitmore*, 191.

13. *Aliter*, if the suit had been brought merely on plaintiff's title as trustee in bankruptcy for money paid in fraud of the Bankrupt Law. *Id.*

14. A complete transcript of the record and files need not be given in evidence to support the deed of an assignee. A certified copy of the order decreeing bankruptcy and appointing the assignee, is sufficient. *Heath v. Hyde*, 263.

IV. *Discharge.*

15. A discharge in bankruptcy of liquidating partner a bar to suit on bond of indemnity to retiring partner who is subsequently obliged to pay firm debts. *Fisher v. Tift*, 9.

16. Who are sureties and what are contingent liabilities, within the meaning of the Bankrupt Law, discussed. *Id.* *Note.*

BILL OF EXCEPTIONS. See ERRORS AND APPEALS, 9.

1. Cannot be used to bring up the whole testimony for review when a case has been tried by the court. *Bitts v. Mogridge*, 388.

2. A bill of exceptions, filed after the term, will not be considered, unless it appears by an entry of record that the opposing party consented. An entry showing merely that he was present is not sufficient; nor will the defect be cured by an entry subsequently made reciting his consent. *State v. Duckworth*, 583.

BILL OF LADING. See COMMON CARRIER, 5.

BILL OF PEACE. See EQUITY, 16.

BILLS AND NOTES. See BAILMENT, 1; COLLATERAL SECURITY, 1; EVIDENCE, 7, 31, 32; HUSBAND AND WIFE, 49, 50, 51; INTEREST, 1; LIMITATIONS, STATUTE OF, 9, 10; NATIONAL BANK, 3; PARTNERSHIP, 3, 8, 12, 14, 16, 25; USURY, 1.

I. *Form, Consideration, etc.*

1. A promissory note; commencing, "We promise to pay," and signed "George Moore, Treasurer of Mechanic Falls Dairying Association," is the note of Moore, and not of the association. *Mullen v. Moore*, 56.

2. A promissory note payable to A. B., trustee, is not commercial paper. *Third National Bank v. Lange*, 382.

II. *Rights of Parties.* See *infra*, III.

3. Demand and notice are not necessary as against an endorser, who, at the maturity of the note, has sufficient property of the maker in his possession held as security against his liability. *Beard v. Westerman*, 56.

4. A holder of a note payable in a distant city uses due diligence if he sends it for collection to a bank in that city, in time to be presented at maturity. He is not bound to provide against an unanticipated suspension of the bank, or an unauthorized interference with the letter by the postmaster. *Pier v. Heinrichshoffen*, 126.

5. A notary's certificate of protest, stating that notice was put in the post office, is sufficient, without stating that the postage was prepaid. *Id.*

6. Delivery of a note by the holder to the maker, with intent to discharge the debt, does discharge it. *Vanderbeck v. Vanderbeck*, 263.

7. While a negotiable note, payable on demand, is by statute dishonored at the end of four months, yet where such note is on annual interest, it will be presumed that the endorser made his endorsement with a waiver of such demand. *Hayes v. Werner*, 330.

8. The taking of security by the endorser, is not a waiver of demand and notice, but is evidence of it. *Id.*

9. Notice of the non-payment of a negotiable promissory note must be given to an accommodation endorser. *Braley v. Buchanan*, 268.

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10. Joint-maker, signing for accommodation, is released by an extension granted without his knowledge. *Barron v. Cady*, 518.

11. Parol declarations of payee at the time of signing, that maker would not be called upon, are not admissible as evidence, and are therefore no defence to the note. *Wright v. Remington*, 743.

III. Endorsement, Acceptance, etc.

12. Evidence of verbal agreement of payee at the time of endorsing a note, that he would assume unconditional liability, not admissible. *Rodney v. Wilson*, 56.

13. After a transfer of a note by endorsement, the amount due cannot be garnished in the maker's hands as a debt due the original holder. *Knisely v. Evans*, 126.

14. The holder of a note endorsed in blank delivered it with his own endorsement, preceded by the words, in his own handwriting, "Received one year's interest on the within, May 10th 1871." *Held*, that the endorsement imported merely an acknowledgment of the payment of interest; and any other intent must be shown by evidence *aliunde*. *Clark v. Whiting*, 126.

15. A telegram agreeing to accept a draft for a certain sum, "for stock," is not a conditional contract, but an absolute undertaking to accept and pay the same. *Coffman v. Campbell*, 198.

16. A subsequent endorser guarantees preceding endorsements, but where the alleged second endorsement was made before delivery, and the payee subsequently wrote his name above it, the rule cannot apply even in favor of a *bona fide* holder without notice. *Third National Bank v. Lange*, 382.

17. Parol evidence is admissible to show the character in which the alleged second endorsers stood towards the note. *Id.*

18. One who endorses a past-due note at the request of the maker, pursuant to a contract with the payee for further indulgence, is liable as guarantor. *Rives v. Thomas*, 511.

19. The endorsement by the payee that he holds himself "responsible for the within note, without notice or protest," is of no other effect than to waive protest and notice as a necessary step to fix his liability. *Halley v. Jackson*, 584.

20. The liability of the maker and endorser is several, and it is error to proceed against them as if they were jointly bound. *Id.*

BOND. See **CONTRACT**, 1.

BOUNDARY.

Where parties claiming under the same grantor recognise a boundary between them, and one of them afterwards conveys with reference to that boundary, he and those who claim under him are bound by the description as against his grantee. *Fuhey v. Marsh*, 518.

BROKER. See **CONTRACT**, 11.

1. It is contrary to public policy to allow a broker to recover commissions from both sides, although he acted in good faith. *Scribner v. Collar*, 389.

2. A broker was employed to find a purchaser for property, the price to be fixed by the vendor. Having found a purchaser, with whom the vendor agreed as to the price: *Held*, that no further duty was imposed upon him. *Hughes v. Young*, 788.

BURDEN OF PROOF. See **DEBTOR AND CREDITOR**, 7; **LIBEL**, 1; **LIMITATIONS, STATUTE OF**, 22; **NEGLIGENCE**, 20.

CASES AFFIRMED, COMMENTED ON, OVERRULED, &c

Barker v. Greenwood, 2 Y. & C. Ex. 414, distinguished. *Ex parte Swinbanks*, 788.

Brine v. Insurance Co., 6 Otto, re-affirmed. *Orvis v. Powell*, 60.

British & Am. Tel. Co. v. Colson, Law Rep., 6 Ex. 19, overruled. *Household Fire Ins. Co. v. Grant*, 728.

Carrington v. Roots, 2 M. & W. 248, and *Reade v. Lamb*, 6 Exch. 130, commented on. *Britain v. Rossiter*, 716.

CASES AFFIRMED, COMMENTED ON, OVERRULED, &c.

- Clafin v. Rosenberg*, 42 Mo. 439, followed. *Wright v. McCormick*, 267.
England v. Davidson, 11 A. & E. 856, commented upon. *Bent v. The Bank*, 291.
Frost v. Knight, Law Rep. 7 Exch. 111, reviewed. *Day v. The Insurance Co.*, 47.
Grizewood v. Blaine, 11 C. B. 538, discussed. *Thacker v. Hardy*, 254.
Hamilton v. The D. V. Railroad Co., 36 Iowa 31, and *Muldowney v. The Illinois, &c., Railroad Co.*, Id. 462, distinguished. *Baldwin v. Railroad*, 761.
Hochster v. De la Tour, 2 E. & B. 678, reviewed. *Day v. The Insurance* 47.
Huntley v. Griffith, F. Moore 452, Goldsborough 159, followed. *In re Barber*, 790.
Inman v. Tripp, 11 R. I. 520, explained and affirmed. *Wakefield v. Newell*, 658.
Moulton v. Sandford, 51 Me. 127, re-affirmed. *Perkins v. Inhabitants of Fayette*, 59.
Pennell v. Deffel, 4 D., M. & G. 372, considered. *In re West of England, &c., Bank*, 788.
Penna. Railroad Co. v. Hope, 80 Penn. St. 373, distinguished. *Hoag v. Railroad*, 214.
Penna. Railroad Co. v. Kerr, 62 Penn. St. 353, followed. *Hoag v. Railroad*, 214.
Preston v. Walker, 26 Iowa 205, followed. *Burrows v. Stryker*, 268.
Snelling v. Lord Huntingfield, 1 C., M. & R. 20, followed. *Britain v. Rossiter*, 716.
The Siren, 7 Wall. 152, and *The Davis*, 10 Id. 15, approved. *Carr v. U. S.* 528.
Viney v. Chaplin, 2 DeG. & J. 468, followed. *Ex parte Swinbanks*, 788.
United States v. Clarke County Court, 96 U. S. 211, disapproved. *State v. Macon County Court*, 459.

CAVEAT EMPTOR. See SALE, 7.

CERTIORARI.

Is not a writ of right when used to correct proceedings of inferior tribunals, and should be denied when it would work public inconvenience. *Trustees v. School Directors*, 519.

CHARTER-PARTY. See SHIPPING, 3.

CHATTEL MORTGAGE. See DEBTOR AND CREDITOR, 1, 22, 23; MORTGAGE, I.

CHECK. See PARTNERSHIP, 9; VENDOR AND PURCHASER, 1.

1. The state treasurer may pay a demand upon the treasury by a check upon a bank where he has money on deposit. *State v. Gates*, 62.

2. When a county treasurer receives from the state treasurer a bank check for money due to the county, it is his duty to present it within a reasonable time, and if he neglects to do this, and the bank fails, the loss will fall upon himself. *Id.*

CHOSE IN ACTION. See HUSBAND AND WIFE, 29.

CITIZENSHIP. See NATURALIZATION, 1; U. S. COURTS, 2, 4.

COLLATERAL SECURITY. See BAILMENT, 1, 2; BILLS AND NOTES, 3; SET-OFF, 4.

The holder of a note secured by a chattel-mortgage, who obtains possession of the property mortgaged, is a trustee of such property and must account for its fair value if he purchase it at a sale made by himself. *Beard v. Westerman*, 57.

COLLISION. See ADMIRALTY, I.; NEGLIGENCE, 7-12.

COMMITTEE. See INJUNCTION, 7.

COMMON CARRIER. See FRAUDS STATUTE OF, 2; RAILROAD, 3-11, 25; SALE, 3.

COMMON CARRIER.

1. If a common carrier knowing that an article is intended for market, delays its delivery, the measure of damages is the depreciation in the market value of the article at the place of consignment, between the time it ought to have been delivered and the time it was delivered. *Devereux v. Buckley*, 127.

2. A party cannot maintain an action against the captain of a boat for preventing her from selling her goods on his boat on an excursion; nor can she recover when the captain put her goods into the baggage-room, and could not deliver them to her, owing to the crowd, until it was too late for her to get them conveyed to the grounds of a picnic where she expected to make sales. *Smallman v. Whiter*, 263.

3. The presumption that when goods are accepted, marked to a place, there is a contract to carry to that place, may be overcome by proof of an express contract to carry only to an intermediate point. *Merchants', &c., Trans. Co. v. Moore*, 519.

4. The conditions on the back of a railroad receipt provided that goods for points beyond the company's line, would be forwarded as opportunity might offer without liability for delay, or would be placed in the company's warehouse at the risk of the owner pending communication with the consignee. In an action against the company for goods destroyed by fire at the company's warehouse at the terminus of their line: *Held*, 1. That the company held the goods as warehousemen. 2. That the evidence in the case was not sufficient to show negligent delay. 3. That there was a presumption that plaintiff's agent read the conditions of the receipt. 4. That a conditional promise by defendant's freight agent to pay for the goods if they were not insured by plaintiffs, would not be binding without proof of non-insurance. *Armstrong v. Railway Co.*, 438.

5. The mere fact that a bill of lading contains a clause limiting the common-law liability of the carrier is not conclusive evidence of such a contract with the shipper. *Merchants', &c., Co. v. Leyser*, 788.

CONFEDERATE STATES. See CONSTITUTIONAL LAW, 13.

1. One who, under the orders of the military authorities of the Confederate states, destroyed cotton to prevent it falling into the hands of the United States forces, is relieved from civil responsibility to the owner of the cotton who at the time voluntarily resided within the lines of the insurrection. *Ford v. Surget*, 127.

2. All people residing within the insurrectionary districts during the civil war were liable to be treated as enemies, without reference to their personal sentiments. *Id.*

3. The Confederate government was merely the head of an insurrection, and the courts cannot recognise the validity of its legislative acts. *Id.*

4. To the Confederate army, however, in order to prevent retaliation, was conceded belligerent rights, and its soldiers are exempt from liability for acts of legitimate warfare. *Id.*

CONFLICT OF LAWS. See ADMIRALTY, 2; FOREIGN JUDGMENT, 1; HUSBAND AND WIFE, 2, 3, 4, 50; INTEREST, 2; RECEIVER, 1, 7; SLANDER, 5; TAX AND TAXATION, 16.

1. In Iowa a contract made in another state authorizing a confession of judgment by an attorney will not be enforced. *Hamilton v. Shoenberger*, 263.

2. Goods were attached in Massachusetts and delivered by the officer to a receptor, who left them with the debtor, by whom they were brought to Connecticut and sold. *Held*, That the right of the receptor to maintain replevin was to be determined by the law of Connecticut. *Peters v. Stewart*, 331.

CONFUSION OF GOODS.

1. A party mixing the property of others with his own, must be able to distinguish his own property or lose it. *Jewett v. Dringer*, 263.

2. A junk dealer fraudulently obtained from a railroad, old iron at less than its value, and mixed it with other old iron belonging to himself, so as to be undistinguishable. *Held*, that he must forfeit the whole to the railroad. *Id.*

CONSTITUTIONAL LAW. See ATTORNEY, 2; CRIMINAL LAW, 17; LIMITATIONS, STATUTE OF, 19; MUNICIPAL CORPORATION, 21, 22, 31, 32; OFFICER, 1; TAX, 2, 8; WATERS, 4, 5.

I. *Powers of Congress.*

1. Congress may legislate respecting the people and property in the District of Columbia, as the legislature of any state over its municipalities. *Mattingly v. District of Columbia*, 199.

II. *Powers of the State Legislature.*

2. A state tax on the amount of an auctioneer's sales, so far as it applies to sales of imported goods in the original package for the importer, is void as a duty on imports and as a regulation of commerce. *Cook v. Pennsylvania*, 57.

3. The constitutionality of an act of the legislature is determined solely by its repugnancy to constitutional restraints, and not by its violation of natural justice. *Bertholf v. O'Reilly*, 111.

4. That a statute impairs the value of property or imposes a liability not known to the common law, does not render it unconstitutional. *Id.*

5. A statute making the owner of premises on which liquor is sold liable for damages resulting from the intoxication of the purchaser, held to be valid. *Id.*

6. Courts not justified in giving strained construction to a constitutional provision or a statute, in order to relieve against individual or local hardships. *Law v. The People*, 128.

7. A statute authorizing the prosecution of the offence of keeping a disorderly house, without an indictment, is unconstitutional. *State v. Anderson*, 129.

8. Not so a statute authorizing a prosecution for the sale of ardent spirits without a license. *Id.*

9. The power of police regulation throughout the state is vested in the legislature, who may require railroad companies to light their railroads within a city or village. *Cin., Hum. & Day. Railroad Co. v. Sullivan*, 199.

10. The 32d chapter of the Ohio Municipal Code of 1869, authorizing city and village councils to require such lighting, is not in conflict with the state constitution. *Id.*

11. When, on default of the railway company, such lighting is procured to be done by the council, the expense may be declared a lien upon the real estate of the company. *Id.*

12. The liability of the railway company to pay such expense can only be enforced by suit, and cannot be collected as a tax or assessment. *Id.*

13. The attempt of the state of Tennessee to separate itself from the Union did not destroy its identity as a state, and its acts during the rebellion are valid, except where done in aid of the rebellion, or where in conflict with the constitution and laws of the United States. *Keith v. Clark*, 331.

14. By the charter of the Bank of Tennessee in 1838, the state agreed to receive the bank's notes in payment of taxes. By a constitutional amendment in 1865, it forbade the receipt for taxes of notes issued by the bank during the rebellion. Held, that this was impairing the obligation of a contract. *Id.*

15. The constitutional provision prohibiting laws impairing the obligation of contracts, does not restrict the right to legislate upon the subject of divorces. *Hunt v. Hunt*, 389.

16. An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed, or which imposes additional punishment to that then prescribed. *Burgess v. Salmon et al.*, 390.

17. The *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal. *Id.*

18. The legislative authority of a state is the right to exercise supreme and sovereign power, subject to no restrictions except those of the state and federal constitutions, and laws and treaties thereunder. *Fry v. The State*, 424.

19. A statute cannot be unconstitutional as impairing the obligation of any contract made after its passage. *Id.*

20. A statute prohibiting the sale of railroad tickets by any person, except

CONSTITUTIONAL LAW.

the agents of the railroads, or by a *bona fide* purchaser of an unused ticket, is not unconstitutional as granting an exclusive privilege. *Fry v. The State*, 424.

21. Nor is such statute a regulation of commerce within the meaning of the federal constitution. *Id.*

22. A state constitution reserved to the legislature the power to change or modify subsequent charters. Afterwards by an Act of the Legislature, two corporations created prior to the constitution, were consolidated with the same privileges secured by their original charters. *Held*, that this created a new corporation which the state might tax notwithstanding an exemption in the charters of the original corporations. *Railroad Co. v. Georgia*, 452.

23. An act creating a liability on the part of the seller for an injury from intoxication, to which the liquor contributes only *in part*, is not unconstitutional. *Sibila v. Bahney*, 457.

24. The police power of the states was not surrendered when the people conferred upon Congress the general power to regulate commerce. *Patterson v. Kentucky*, 519.

25. The police power extends to the protection of the lives, the health and the property of the community. *Id.*

26. State legislation, strictly and legitimately for police purposes, does not necessarily intrench upon any authority confided to the national government. *Id.*

27. A Kentucky statute provided for the inspection of certain oils before sale, and that such as ignited at less than a certain degree of heat should be condemned as unfit for sale: *Held*, a police regulation, and not in conflict with the Federal constitution. *Id.*

28. States may regulate remedies subject to the restriction that as to past contracts the remedy be not so materially lessened as to impair the obligation of the contracts. *Taylor v. Stockwell*, 569.

29. A state law exempting property from execution is valid as to prior contracts, provided that the creditor's remedy is not so materially lessened as to impair the obligation of the contract. *Id.*

30. A statute may be void as to certain classes of persons, and valid as to others. *State v. Amery*, 656.

31. A law, constitutional within certain limitations, may, if it exceeds those limitations, be void only for the excess. *Id.*

32. Statutes directing suits for specific objects to be brought by an attorney-general, and regulating the proceedings in them, are very common, and their validity has uniformly been recognised: *United States v. Railroad Co.*, 335.

33. An ordinance of San Francisco that every male person imprisoned in the county jail under judgment of a criminal court should have the hair of his head "cut or clipped to the uniform length of one inch from the scalp," is invalid as being in excess of the municipal authority, and in violation of the 14th amendment of the U. S. constitution. *Ho Ah Kow v. Nunan*, 676.

34. Evasion of constitutional limitations by state legislatures and the extent of the prohibition of class legislation, discussed. *Id.*, Note.

35. The legislative right to order low lands to be drained, at the expense of the owners, rests entirely on ancient custom, and cannot be deduced from the power to legislate, unless the reclamation of the lands is a matter of direct public concern. *Hoagland v. Wurts*, 727.

36. When such legislation is founded on usage it must conform to the usage. *Id.*

37. The rules of descent and the power of disposition by will may be regulated from time to time by the legislature. *Enmert v. Hays*, 792.

III. Taking Private Property. Eminent Domain. See MUNICIPAL CORPORATION, 10, 13, 31, 32; WATERS AND WATERCOURSES, 4.

38. Where an easement has been appropriated, but the landowner retains substantial rights in the property, he is not entitled to the value of the land in fee. *Dodson v. Cincinnati*, 391.

39. Public authorities have a reasonable time after the ascertainment of the

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expense of taking lands for public use to decide whether to accept or refuse the land. *O'Neill v. Freeholders, &c.*, 729.

40. Commissioners appointed under a special statute reported a valuation of lands intended to be taken, but a motion to accept the lands at such valuation was rejected at a meeting of the board of freeholders: *Held*, that such rejection was a finality, and that the power given by the act was exhausted: *Id.*

41. Respective rights of state and United States, and obligation to make compensation for land taken, discussed. *Note to Greve v. St. Paul, &c., Railroad Co.*, 705.

CONTEMPT.

A committal for contempt in refusing to pay alimony, if regular on its face, will not be reviewed on an application for the writ of habeas corpus. *In re Bissell*, 452.

CONTRACT. See AGENT, 3; CORPORATION, 8; CUSTOM, 1; EQUITY, 1; FRAUD, 4, 8; GUARANTY, 1, 2; HUSBAND AND WIFE, 20, 21, 27, 28; INSURANCE, 4-11; MUNICIPAL CORPORATION, 10, 11; NAME, 1; REWARD, 1; SALE, 3, 6; SPECIFIC PERFORMANCE, 1, 4, 10, 16.

1. A bond for duties was conditioned that the importer should pay \$425, or the amount ascertained to be due, or should withdraw and export the goods: *Held*, the word "or" could not be construed "and." *Dumont v. United States*, 64.

2. Executory contract for the sale of chattels, to be delivered in the future, valid, although at the date of contract the seller does not have them, nor any means of getting them. *Sawyer v. Taggart*, 222.

3. An understanding when the contract is made that at its maturity it shall be settled by payment of differences in price renders the contract illegal. *Id.*

4. *Aliter*, if either party contracts in good faith and the agreement to settle by differences is made subsequently. *Id.*

5. A party ordering a re-sale of property before the contract time for delivery will be liable for all losses thereby. *Id.*

6. Validity of, for future delivery of property not owned by vendor. *Sawyer v. Taggart*, 222, *Note*; *Thacker v. Hardy*, 254, *Note*.

7. Where the consideration of a contract declared void by statute is morally good, a repeal of the statute will validate the contract. *City v. Bank*, 390.

8. A park association offered a purse to be divided among the winning horses in a race according to their speed, and required all persons entering horses to pay an entrance fee of ten per cent. on the whole sum. *Held*, not a gaming transaction within the Illinois Act of 1845, and that a note given for the entrance fee was valid. *Wilson v. Conlin*, 490, and *Note*.

9. When parties contract to act as agents to sell sewing-machines in a particular locality, and the company withdraws them from such place, they will have the right to rescind the contract; but if the company has reserved the right to change the character of their employment, they will not have the right to rescind, although directed to sell in a different locality. *Howe Sewing-Machine Co. v. Layman*, 520.

10. Rescission does not always require the express agreement of both parties; but where the contract is executory upon non-performance by one party, the other may declare it rescinded. *School District v. Hayne*, 656.

11. A stockbroker may recover from his principal commissions and advances, although he knew that his principal did not intend to actually receive or deliver the stock bought or sold, but to settle by differences. *Thacker v. Hardy*, 254.

12. *Grizewood v. Blaine*, 11 C. B. 538, discussed. *Id.*

13. A contract to cut and deliver one million feet of logs at \$4.25 per thousand feet, to be scaled and received as each one hundred thousand feet are put in floating water, *held* to be a severable and not an entire contract. *Tenny v. Mulvaney*, 728.

14. Defendant applied for shares in a company. The company allotted

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the shares to him and posted a letter addressed to him containing the notice of allotment, but the letter never was received. *Held*, that the defendant was a shareholder. *British and American Telegraph Co. v. Colson*, Law Rep. 6 Ex. 18, overruled. *Household Fire Ins. Co. v. Grant*, 728.

CONTRACTOR. See **MASTER AND SERVANT**, 1.

CONVEYANCE. See **FRAUDULENT CONVEYANCE**, 1.

COPYRIGHT. See **EXECUTION**, 4.

A simple copyright of a map does not give a publisher an exclusive right to the particular signs and key which he adopted. *Perris v. Hexamer*, 452.

CORPORATION. See **ACTION**, 1, 6; **ATTACHMENT**, 3; **BANKS**; **BILLS AND NOTES**, 1; **CONSTITUTIONAL LAW**, 22; **CRIMINAL LAW**, 45; **EQUITY**, 22; **EVIDENCE**, 21; **MUNICIPAL CORPORATION**, **RAILROAD**; **RECEIVER**, 4; **TAXATION**, 7, 8.

1. Corporations possess only the powers conferred upon them by the law of their creation, and when created by public acts of the legislature, parties dealing with them are chargeable with notice of their powers and the limitations thereof. *Franklin Co. v. Lewistown Institution, &c.*, 57.

2. A savings institution having no funds for investment borrowed money to purchase stock in a corporation, giving the lender its notes for the purchase-money and allowing him to take the stock in his own name as collateral security. *Held*, that its purchase of the stock was *ultra vires*, and that it was not estopped from setting up that defence. *Id.*

3. *Seem*, that in the United States corporations cannot purchase, hold or deal in stocks of other corporations unless expressly authorized by law. *Id.*

4. A charter of a bank provided that "each stockholder shall be liable to double the amount of stock held by him, and for three months after giving notice of transfer, &c." *Held*, that a stockholder's liability to a creditor was primary, and not secondary, and having incurred the liability, he was not released by not being sued within three months after transfer of his stock. *Fuller v. Ledden*, 263.

5. Interference by the attorney-general with corporations on the ground of a trust in the government, is limited to two classes of cases: 1. Religious, charitable, municipal or other corporations whose functions are solely public, and whose managers are abusing their functions. 2. Other corporations which are exercising powers beyond those to which they are limited. *United States v. Railroad Co.*, 331.

6. Validity of articles of incorporation cannot be inquired into incidentally and collaterally. *Keene v. Van Reuth*, 453.

7. Subscribers to the stock of an insurance company gave promissory notes, payable on demand, for their subscriptions. *Held*, that construed in connection with the nature of the business of the corporation, the notes were intended to be payable on the call of the directors; and the Statute of Limitations was not a defence. *Kilbreath v. Gaylord*, 457.

8. The contract of a corporation is presumed to be *infra vires* until the contrary appears. *Southern Express Co. v. Railroad Co.*, 520.

9. Stockholders who organize a corporation and thereby induce persons to credit it, will be estopped from alleging that the charter is unconstitutional in order to avoid personal liability. *McCarthy v. Lavasche*, 728.

10. Trustees selected both by the corporation and its bondholders, and operating the road to earn money to pay the debts of the corporation, are agents of the corporation as to third persons, and such persons may sue the corporation for the acts of such trustees. *Grand Tower Man. Co. v. Ullman*, 789.

COSTS. See **DAMAGES**, 1.

COUNTY. See **INJUNCTION**, 1; **MUNICIPAL BONDS**, 2; **MUNICIPAL CORPORATION**, 1, 2.

COURTS. See **ARBITRATION**, 1; **CONTEMPT**, 1; **CRIMINAL LAW**, 1-28; **JUDGMENT**, 3; **JURISDICTION**; **PROBATE COURTS**; **REMOVAL OF CAUSES**; **UNITED STATES COURTS**.

Courts have jurisdiction to make their records conform to what was actually done. *City of Elizabeth et al. v. The American Nicholson Pavement Co.*, 199.

COVENANT. See **VENDOR AND PURCHASER**, 6, 7.

CRIMINAL LAW. See **CONSTITUTIONAL LAW**, 7; **ERRORS AND APPEALS**, 9; **INTOXICATION**, 1; **JURISDICTION**, 3; **JUROR AND JURY**, 1; **LIMITATIONS**, **STATUTE OF**, 8; **REWARD**, 1; **STATUTE**, 11; **VERDICT**, 3.

I. Generally.

1. A court passing sentence for a misdemeanor under a misapprehension of the facts, may at the same term, and before the sentence has gone into effect, alter the sentence. *Lee v. The State*, 57.

2. In the absence of anything on the record showing what the facts were, the reviewing court will presume that the court below acted upon sufficient information. *Id.*

3. Upon a trial for intoxication, evidence of defendant's conduct when previously intoxicated, is admissible to show the character of the acts relied on as evidence in the case. *The State v. Huxford*, 58.

4. A witness may state his opinion as to the intoxication of a person, and is not confined to a statement of the conduct of such person. *Id.*

5. Where a prisoner is convicted under two distinct indictments, and is separately sentenced under each to a term of imprisonment, the terms are not concurrent. *Williamson's Case*, 128.

6. Upon the trial of a person jointly indicted with another, the prosecution will not be permitted to show that the latter is in the penitentiary of another state. *State v. English*, 128.

7. When the prosecution has given evidence tending to prove that the defendant went to the place where the crime was committed for the purpose of committing it, the defendant will be allowed to show that he went thither on legitimate business. *Id.*

8. Evidence that the defendant stole property of Peter Sinish, will not sustain an indictment for stealing property of John Peter Sinish. *Id.*

9. Mere concealment of a murder does not make a man an accessory, but is a misprision of felony. *State v. Hann*, 128.

10. A criminal does not, by becoming a witness in his own behalf, waive the privilege of having his confidential communications to his attorney protected from disclosure. *Duttenhofer v. The State*, 136.

11. When a defendant testifies in his own behalf, the state may impeach his character before he offers any evidence that it is good. *State v. Cox*, 264.

12. Before permitting witnesses to testify as to the reputation of a witness, they must show that they are acquainted with it. *Id.*

13. If a defendant testifies in his own behalf, he subjects himself to the same rules as to cross-examination and impeachment as other witnesses. *State v. Clinton*, 264.

14. An indictment under sect. 163 of art. 30 of the Maryland Code, charging a party with receiving stolen United States bonds, must charge distinctly that they were bonds "granted by or under the authority of the United States." *Kearney v. The State*, 390.

15. An indictment should allege all matters material to the particular crime charged, with such positiveness and distinctness as not to need the aid of intendment. *Id.*

16. In an indictment for an offence created by statute, it is sufficient to describe the offence in the words of the statute, and the indictment should follow the language of the statute. *Id.*

17. A party not having been tried on a valid indictment, has not been put in jeopardy, and may be tried again. *Id.*

18. Where a convict is taken from the penitentiary to testify as a witness, it is competent to prove that his reputation for truth and veracity was bad at the time of and previous to his conviction. *Hamilton v. The State*, 391.

19. It is error to permit the state to prove by cross-examination of defend-

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ant's witness, that the accused stands indicted for other offences. *Hamilton v. The State*, 391.

20. The presumption that a married woman who commits a criminal act in the presence of her husband acts under his coercion, is only *prima facie*. *Tabler v. The State*, 391.

21. It is no ground for the reversal of a judgment that a motion for a new trial was made, argued and overruled in the absence of the prisoner, where no objection was made till after sentence. *Griffin v. The State*, 454.

22. The fact that the prosecuting attorney began his closing argument while the defendant was temporarily absent, will not warrant the reversal of a judgment of conviction. *State v. Grate*, 454.

23. Where one does an act apparently in violation of a criminal statute, circumstances that tend to show a want of guilty intention may be given in evidence on the trial. *Farrill v. The State*, 520.

24. One indicted for selling intoxicating liquor, may show that he bought and sold the liquor believing it not to be intoxicating. *Id.*

25. Wife not a competent witness for her husband in a criminal prosecution. *Schultz v. State*, 528.

26. A defect in the verification of an information is waived by pleading to the merits and going to trial. *State v. Ruth*, 578.

27. Where an accomplice is convicted after having been made a witness by the state, he has an equitable claim to a judicial recommendation to the mercy of the pardoning power. *State v. Graham*, 584.

28. It is competent for the court to order the accomplice to be acquitted, for the purpose of qualifying him as a witness, or to accept from him a plea admitting guilt in a minor degree, or to assent to the entering of a *nolle prosequi*. *Id.*

II. Bigamy.

29. It is no defence that the accused was a Mormon, and that he married the second time because he believed it to be his religious duty. *Reynolds v. United States*, 454.

III. Bribery.

30. What acts amount to. *Note to State v. Collier*, 773.

IV. False Pretence.

31. An indictment for obtaining goods in exchange for land under false pretences, charged that defendant *designedly*, feloniously and falsely pretended that he was the owner of the land, and averred that he was not the owner, but did not charge that he knew he was not the owner: *Held*, that this was a fatal defect. *State v. Bradley*, 584.

32. The indictment also charged that defendant pretended that he had an abstract which showed a perfect title; but there was no averment that he did not have such an abstract: *Held*, that this defect was fatal, and was not supplied by an averment that defendant well knew the abstract to be imperfect and untrue. If such was the fact, the abstract should have been set out as a false writing, and the defendant charged with pretending that it was a true abstract. *Id.*

V. Forgery.

33. It is not essential to the crime of forgery that the person or corporation in whose name the instrument purports to be made, shall have legal capacity to make it. *State v. Eades*, 584.

VI. Libel.

34. Whether matter published is obscene or not, is a question of law and not of fact, and the supposed obscene matter must be set out in the indictment. *McNair v. People*, 728.

VII. Murder. See *supra*, 9.

35. The application of the common-law rule, that a criminal offence is neither excused nor mitigated by the voluntary intoxication of the accused, in trials for murder, is not affected by No. 44, Acts of 1869, of Vermont, making degrees of murder. *State v. Tatso*, 153.

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36. *Seemle*, a party under reasonable apprehension of danger of life or great bodily harm, has a right in self-defence to take the life of the aggressor, but he must have had no agency in bringing about the danger. *Baker v. Kansas City Times Co.*, 101, and *Note*.

37. Prisoner's counsel offered to prove by the widow of the murdered man that her husband was jealous of her, and had accused her of being too intimate with other men than the prisoner, and proposed to follow up this proof by evidence that the killing for which the prisoner was indicted, grew out of a quarrel with the deceased, occasioned by the deceased having charged the prisoner with being too intimate with the wife of the deceased: *Held*, that the proof offered was inadmissible. *Costley v. State*, 454.

38. The general reputation in the neighborhood that the deceased was jealous of his wife, not admissible in evidence. *Id.*

39. Where a statute provides that murder committed in the perpetration of arson, rape, &c., or other felony, shall be murder in the first degree, the words *other felony* refer to a felony collateral to the homicide, and not to acts which are constituent elements of the homicide itself. *State v. Shock*, 728.

VIII. Nuisance.

40. A house in which unlawful sales of liquor are habitually made, is an indictable nuisance, although there is a city ordinance prescribing the penalties for such sales. *Meyer v. State*, 584.

IX. Rape.

41. Upon a petition for a new trial: *Held*, 1. That the existence of newly-discovered evidence could not be proved by *ex parte* affidavits. 2. That evidence of previous statement of witness inconsistent with statement on trial was not sufficient. 3. Nor a change in the opinion of the victim as to the identity of the criminal, where such change was the result of a suggestion, and was arrived at by a process of reasoning. *Shields v. The State*, 461.

42. A new trial will not be granted upon the mere after-recollection of a former witness. *Id.*

43. When an indictment, in distinct counts, charges a rape and an attempt to commit a rape, referring to the same act, a verdict of guilty as to either count amounts to an acquittal as to the other without an express finding. *State v. Cofer*, 455.

44. Physical resistance of the female is not essential if in consequence of threats she submits through fear of death or great personal injury. *State v. Ruth*, 578.

X. Sabbath breaking.

45. A corporation may be indicted for "Sabbath breaking," under the 16th and 17th sections of chapter 149 of the code of West Virginia. *State v. B. & O. Railroad Co.*, 728.

CURTESY. See HUSBAND AND WIFE, II.

CUSTOM. See EVIDENCE, 33; MASTER AND SERVANT, 6; MINES AND MINING, 2.

One dealing in a particular market is presumed to deal according to the custom of the market, and the same rule applies where the dealing is done through an agent, and the principal is ignorant of the custom. *Bailey v. Bensley*, 264.

DAMAGES. See COMMON CARRIER, 1; FRAUDS, STATUTE OF, 5; INTOXICATING LIQUORS, 1; JUDGMENT, 1; LIBEL, 6, 12; MASTER AND SERVANT, 4; NEW TRIAL, 7; OFFICER, 10; RAILROAD, 23; SLANDER, 6, 8; TROVER, 4.

1. In an action for breach of covenant of warranty, the grantee may recover taxable costs, but he cannot recover attorney's fees without proof that he has incurred liability to the extent of the fees claimed. *Swartz v. Ballou*, 264.

2. A jury in assessing damages caused by the establishment of a public road, can consider in reduction of damages, only such special benefits as are the direct and proximate result of the road, and not such as are common to the whole community. *Roberts v. Board of Commissioners*, 394.

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3. Increased value founded merely upon increased facilities for public travel and transportation, cannot be considered. *Roberts v. Board of Commissioners*, 394.

4. The measure of damages for putting up a defective steam-boiler, is the difference between its value in its defective condition and its value if completed in compliance with the contract. *White v. Brockway*, 520.

5. The measure of damages for failure to pay the joint obligations of others, is the whole amount of the debts. *Pratt v. Bates*, 586.

6. Where a tunnel is authorized by an act of the legislature, and directed by an ordinance of a city, the city is not liable for consequential damages. *Northern Trans. Co. v. Chicago*, 589.

7. Persons appointed by law to make or improve a highway, are not answerable for consequential damages, if they act within their jurisdiction and with care and skill. *Id.*

8. A contract to cut wood, stipulated that in case the wood was not all cut by the time named in the contract, the laborer should forfeit five cents per cord on the wood cut. *Held*, that such stipulation fixed the measure of damages. *Lung Louis v. Brown*, 729.

DEBTOR AND CREDITOR. See FRAUDS, STATUTE OF, 1, 4; FRAUDULENT CONVEYANCE, 1; GUARANTY, 4; HUSBAND AND WIFE, 16, 17, 37; JOINT-DEBTORS; MORTGAGE, 4; PARTNERSHIP, 3.

1. The mere fact that a mortgagee of chattels leaves them in the mortgagor's hands to sell and remit the proceeds is not itself fraud, but proper evidence in connection with other facts to show fraud. *Fisk v. Harshaw*, 129.

2. Where a voluntary conveyance is made, the law raises a conclusive presumption of fraud as to existing debts, but a subsequent creditor must show either actual fraud or that debts which existed at the time of the conveyance are still outstanding. *Claffin v. Moss*, 199.

3. Payment of all debts existing at the time of a voluntary conveyance, repels the idea of fraud. *Id.*

4. An administrator cannot sell an interest in lands conveyed by his intestate in fraud of creditors, and his grantee cannot maintain a bill to avoid the fraudulent conveyance. *Beebe v. Sautter*, 264.

5. The change of possession, contemplated by the statute of fraudulent conveyances (1 W. S. p. 281, § 10), must be open, notorious and unequivocal. (Following *Claffin v. Rosenberg*, 42 Mo. 439, and other cases.) *Wright v. McCormick*, 267.

6. If the purchaser of a stock of goods permits them to remain at the vendor's place of business, without removing his sign, the change of possession is not unequivocal. *Id.*

7. Goods attached were delivered by the officer to a receptor, who left them with the debtor. The latter sold them. *Held*, that the purchaser could hold the goods if he purchased in good faith, but the burden was on him to show that fact. *Peters v. Stewart*, 331.

8. Creditors cannot complain of the disposal of property that they cannot reach. *Dart v. Woodhouse*, 393.

9. The right of a debtor to assign his whole estate for his creditors results from that absolute ownership which every man claims over his own. *Reed v. McIntyre*, 455.

10. Such assignments not made to delay or defraud creditors, were upheld at common law even where certain creditors were preferred. *Id.*

11. An assignment which had the effect to delay a creditor in the enforcement of his demand by law, was not, for that reason alone, fraudulent and void. *Id.*

12. A purchaser's good faith is not conclusively established by his uncontradicted testimony. The question is for the jury. *Molitor v. Robinson*, 455.

13. A sale not accompanied by immediate delivery, is only *prima facie* fraudulent as against creditors. *Id.*

14. A vendor to a firm claimed to have relied on the assurance of a partner that their assets exceeded their liabilities. It was shown that when the vendor's agent had asked one of the firm how he reconciled this assurance with a

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subsequent failure, the latter said something about having lost a good deal of money in a series of years in failures. *Held*, that even though this answer may not have been material, its admission was harmless. *Shipman v. Seymour*, 521.

15. An agent was instructed to inquire into a customer's credit and to sell to him if satisfied with his answers. He sent an order to his principal without communicating the answers. *Held*, that the principal had a right to assume that the inquiries were made, and that the answers were satisfactory. *Id.*

16. In an action involving the good faith of a firm in buying goods just before they failed, a written answer to an inquiry by the vendor as to their credit, which, though true in fact, tended to mislead, was admissible in evidence. *Id.*

17. Any purchase obtained by false representations as to solvency made by a firm within a period before its failure equal to the period of credit usually allowed to it upon its purchases, may be shown as bearing on the question whether another purchase made within that period was fraudulent or not, in contemplation of insolvency. *Id.*

18. No inference of fraud can be drawn from the fact that money not yet due remains unpaid, but there is no error in admitting testimony that the purchase price of goods purchased by means of a falsehood, is still unpaid. *Id.*

19. It is an act of bad faith for a mortgagee to withhold from record a mortgage given him by a debtor in order to shield the latter from demands that have been contracted in ignorance of its existence. *Id.*

20. When the good faith of a mortgage is in question, the time when it was filed and the use afterwards made of it, may be shown. *Id.*

21. A purchase made by one who is insolvent and with the purpose not to pay, is void, even though the buyer has not made false representations. *Id.*

22. Whether a mortgage, which allows the mortgagor to retain possession of the personalty or to sell and replace the same, is fraudulent as against his creditors, should be determined by a jury from the circumstances. *Williams v. Winsor*, 661.

23. Where mortgaged chattels are left in the hands of the mortgagor with an unlimited power of disposal for his benefit, the mortgage is void as to purchasers and creditors. *Orton v. Orton*, 729.

DECEDENT'S ESTATE. See **EXECUTORS AND ADMINISTRATORS**; **PROBATE COURTS**; **WILL**.

DECEIT. See **FRAUD**.

DEED. See **EQUITY**, 12, 19; **MISTAKE**, 3;

1. Not set aside on the ground of weakness of grantor's intellect unless undue advantage taken of such weakness. *Marmon v. Marmon*, 58.

2. A void deed of a homestead, in all cases where a similar deed of other property could be ratified, may be ratified by the assent or contract of the parties, expressed or presumed from their acts. *Spafford v. Warren*, 59.

3. Very clear proof is required to impeach a certificate of the acknowledgment of a deed or mortgage. The uncorroborated testimony of the party executing the same, is not sufficient. *McPherson v. Sanborn*, 521.

4. Where the terms of a deed as agreed upon are given by the parties to the conveyancer, and the grantor, without the knowledge of the grantee, afterwards causes other terms to be inserted, and the grantee signs, supposing it to be drawn as agreed upon, a court of equity will reform the deed. *Berger v. Ebey*, 585.

DEMURRAGE. See **SHIPPING**, 4.

DIVORCE. See **CONSTITUTIONAL LAW**, 15; **HUSBAND AND WIFE**, I.

DOMICILE. See **HUSBAND AND WIFE**, 1, 4.

DOWER. See **HUSBAND AND WIFE**, II.

DRAINAGE. See **CONSTITUTIONAL LAW**, 35.

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DRUNKENNESS. See **CRIMINAL LAW**, 3, 4, 35; **INTOXICATION**.

DURESS. See **ASSUMPSIT**, 2; **EQUITY**, 13; **HUSBAND AND WIFE**, 51.
What constitutes duress. *Note to Wright v. Remington*, 748.

EASEMENT. See **CONSTITUTIONAL LAW**, 38; **EJECTMENT**, 2; **MUNICIPAL CORPORATION**, 10, 31, 32; **SUPPORT**.

1. Non-user for twenty years evidence of intention to abandon but controlled by proof that owner had no such intention. *Pratt v. Sweetser*, 58.

2. Title by adverse user rests upon the presumption of a lost grant. *Lehigh Valley Railroad v. McFarlan*, 200.

3. To raise the presumption of such grant continuous and peaceable use for over twenty years must be shown. *Id.*

4. Proof of acquiescence by the owner of the servient lands is indispensable in proving title by adverse user. *Id.*

5. Where the user has been exercised by force, or by permission, or in the face of protests and in defiance of resistance, a grant cannot be presumed. *Id.*

6. Resistance by words is sufficient to prevent the presumption of a grant. *Id.*

7. No implied reservation of an easement, though it be continuous and apparent, unless it be an easement of necessity. *Wheeldon v. Burrows*, 646.

8. A vendor conveyed part of his property to A., without reservation, and subsequently another part to B. Upon B. claiming a right of light over A.'s plot, which, in the opinion of the court, was not an easement of necessity: *Held*, that B. was not entitled to recover. *Id.*

9. Implied easements of light and air discussed. *Id. Note*

10. The access of air to the chimneys of a building cannot be claimed either as a natural right of property or as an easement by prescription. *Bryant v. Lefevre*, 780.

EJECTMENT. See **POSSESSION**; **UNITED STATES**, 3; **VENDOR AND PURCHASER**, 8.

1. Where both parties are mortgagees, the party having the oldest mortgage, from the common mortgagor, who first forecloses and acquires a deed, must prevail. If the junior mortgagee has equitable rights by not being made a party to the foreclosure, he must resort to a court of chancery. *Aholtz v. Zellar*, 521.

2. Ejectment does not lie for an incorporeal easement. *Taylor v. Gladwin*, 455.

3. The recital of an incorporeal right in a judgment of ejectment is nugatory. *Id.*

ELECTION. See **OFFICER**, 5, 11.

1. Boards of canvassers sitting to correct voting lists, exercise judicial function. *Keenan v. Cook*, 657.

2. Query, whether they are liable in a civil action, for striking off or omitting a name from the voting list. *Id.*

3. Even if so liable they are the judges of the proof of disqualification, and in an action against them it must be shown that they acted without proof satisfactory to them. *Id.*

4. If their act, although precipitate and erroneous, was not dishonest or wilful they are not liable. *Id.*

EMINENT DOMAIN. See **CONSTITUTIONAL LAW**, III; **MUNICIPAL CORPORATION**, 10, 13, 31; **WATERS AND WATERCOURSES**, 4.

ENCUMBRANCE. See **INSURANCE**, 20; **LIEN**; **MISTAKE**, 3; **MORTGAGE**; **VENDOR AND PURCHASER**, 15.

EQUITY. See **ASSIGNMENT**, 2; **DEED**, 4; **DURESS**, 1; **EJECTMENT**, 1; **EXECUTOR AND ADMINISTRATOR**, 3; **FORMER ADJUDICATION**, 2, 6; **FRAUD**, 3; **HUSBAND AND WIFE**, 20, 47; **INJUNCTION**; **JUDGMENT**, 1, 2; **JURISDICTION**, 5; **LIMITATIONS, STATUTE OF**, 5, 6; **MISTAKE**; **MORTGAGE**, 16, 17, 18, 21; **NUISANCE**, 3, 7; **PARTNERSHIP**, 23; **RAILROAD**, 17, 18;

EQUITY.

RECEIVER; SET-OFF, 1; SPECIFIC PERFORMANCE; SUBROGATION; TAXATION, 15; USURY, 2; VENDOR AND PURCHASER, 1, 3.

1. Equity will relieve against mutual mistakes of the parties in the execution of written contracts. *Snell v. Insurance Co.*, 79.

2. Such mistakes may be shown by parol evidence, but such evidence is to be received with great caution. *Id.*

3. A mere mistake of law, stripped of all other circumstances, not a ground for reforming a written contract. *Id.*

4. When, however, such mistake is unaccompanied by any negligence, and the denial of relief would enable the other party to obtain an unconscionable advantage, a court of equity will reform the instrument. *Id.*

5. A partner insured firm property in his own name being assured by the agents of the company that this would cover the interest of the firm. Afterwards the agents refused to correct the policy. *Held*, that a court of equity had jurisdiction to reform the policy. *Id.*

6. Reformation of contract for mistakes of law discussed. *Id. Note.*

7. Except in the almost obsolete action of account, partners, whether general or for a particular transaction, cannot obtain an account at law, but must apply to equity. *Iverson v. Hutton*, 129.

8. Courts of equity can correct mistakes in written instruments, even as to the most material stipulations; but the power should always be exercised with great caution. *Id.*

9. Where an instrument is intended to carry a prior agreement into execution, and by mistake fails to fulfil this intention, equity will correct the mistake. *Id.*

10. In equitable actions, even where questions of fact are submitted to a jury, the court must find that all the facts necessary to sustain the judgment have been established. *Stahl v. Gotzenberger*, 129.

11. Issues of fact submitted to a jury in an equitable action should be particular issues, and the court, if not satisfied, may submit the same issues to another jury, or may itself determine them. *Id.*

12. Equity will not relieve against the mutilation of a conveyance, nor enforce an agreement, where the conveyance and agreement have been procured by fraud. *Fargo v. Goodspeed*, 131.

13. On a bill to set aside a transfer of property, obtained by duress, persons in whose favor certain charges on the lands thereby conveyed were made, are necessary parties. *Probasco v. Probasco*, 200.

14. A bill which alleges that a feeble old man has, without consideration, transferred to his children all of his property, amounting to \$45,000, reserving to himself only an annuity of \$1200, inadequately secured, and without any provision whatever for his wife, in case she survive him; and that such transfer was obtained from him by want of comprehension on his part, and duress and false representations as to its effect on the part of his children, shows sufficient equity, and will be sustained on demurrer. *Id.*

15. In case of the bailment of property to a factor in trust to sell, a court of chancery has no jurisdiction to enforce the trust. *Taylor v. Turner*, 200.

16. A bill of peace can only be maintained after the complainant has satisfactorily established his right at law, or where the defendants are so numerous as to render the bill necessary to save multiplicity of suits. *Lehigh Valley Railroad Co. v. McFarlan*, 200.

17. Where several plaintiffs bring different suits at law against one defendant, some for diminishing their supply of water, and another for backing water on his mill-wheel, no ground for interference to prevent multiplicity of suits is shown. *Id.*

18. The maxim, that he who asks equity must do equity, may be applied whenever it is necessary to the promotion of justice. *Mutual Benefit Life Ins. Co. v. Brown*, 201.

19. At common law, signing is not necessary to the due execution of a deed, but it is made so by the Statute of Frauds. *Id.*

20. But if the grantor's name is written in his presence and by his direction, it is his act, and he will not be permitted, in a court of equity, to repudiate the deed. *Id.*

EQUITY.

21. It is the province of equity to prevent those holding positions of trust from using them for their own aggrandizement. *Berkmeyer v. Kellerman*, 202.

22. Equity has jurisdiction and may enjoin suits at law in a case involving the relative rights of two corporations to the use of the same stream. *Rail-road Co. v. Society*, 208.

23. Where an oral contract is afterwards reduced to writing, and through the draughtsman's mistake, it fails to express the real intention of the parties, equity will correct the mistake. *Nowlin v. Pyne*, 265.

24. When there is a demurrer to the whole bill, and also to part, and the latter only is sustained, the decree is to dismiss so much of the bill as seeks relief in reference to the matters adjudged bad, and to overrule the demurrer to the residue. *Giant Powder Co. v. California Powder Works*, 266.

25. It is essential to a bill by the government to set aside a patent or confirmation of title under a Mexican grant, that it shall appear in some way, that the attorney-general has brought it himself, or given such authority for it as will make him officially responsible. *The United States v. Throckmorton et al.*, 266.

26. The frauds for which a bill will be sustained to set aside a judgment, are frauds extrinsic to the matter tried by the first court, and not a fraud which was in issue in that suit. *Id.*

27. The cases in which such relief has been granted, are those in which by fraud practised on the unsuccessful party, he has been prevented from exhibiting fully his case. *Id.*

28. A deed to purchasers under a judgment and sale made by an auditor, cannot be avoided on the ground of fraud in the sale, without making the creditors and auditor parties. *Wilson v. Bellows*, 265.

29. This defect, in not joining proper parties, is good ground for demurrer, where it appears on the face of the bill. *Id.*

30. When the purchasers are not charged with fraud, relief against them will only be granted on equitable terms. *Id.*

31. An owner sold land to a railroad at an exorbitant price, and allowed the land to be built upon and included in a mortgage of the road before payment of the price. The road became insolvent, and a receiver was appointed. *Held*, That the court would not order payment of the agreed price, but would direct just compensation to be paid to the owner. *Coe v. Railway*, 332.

32. A suit in equity will not lie to enjoin the execution of process issued in another such suit. *Endter v. Lennon*, 391.

33. May grant relief against ignorance of the law, but not against ignorance of facts. *Andreas v. Redfield*, 455.

34. Where a decree has been passed by default, equity has power to vacate the enrolment in order to let in a meritorious defence, and this may be done upon petition, without a bill of review or an original bill for fraud. *First National Bank v. Eccleston*, 455.

35. This discretion extends as well to the time when the petition is to be filed as to the other circumstances. *Id.*

36. Upon a petition to correct a mistake in a mortgage, the court will not grant relief upon grounds not stated in the petition. *Cox v. Esteb*, 456.

37. A court of equity will not divide gains resulting from acts involving moral turpitude. And profit by an agent to buy, who is also secretly the seller, is within this rule. *Todd v. Rafferty's Adm'r*, 476.

38. How far courts will assist in enforcing illegal contracts, discussed. *Id. Note.*

39. In matters of account, more especially, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy. *Hall's Adm'r v. Clagett*, 585.

40. A transaction that is in fraud of one's rights may be construed in equity so as to be a means of protecting them. *Huxley v. Rice*, 592.

41. On a testamentary trustee's bill for instructions, the court will only instruct as to circumstances existing or certain to arise. *Goddard v. Brown*, 657.

42. Nor will the court decide whether an interest is vested or contingent

EQUITY.

where the question can only become important by the death of a living *cestui*. *Goddard v. Brown*, 657.

43. Generally a cross-bill implies a bill brought by a defendant against the plaintiff, or against other defendants, or against both. When filed against co-defendants, it is proper to make the plaintiff in the original suit a defendant in the cross-bill. *W. Virginia, O. & O. L. Co. v. Vinal*, 657.

44. Being a mere auxiliary suit, a cross-bill need not show any ground in equity to support the jurisdiction of the court. If, however, it seeks relief, such relief must be equitable. *Id.*

45. Where it prays for affirmative relief, the court, after the dismissal of the original bill, may proceed with the cross-bill as an original. *Id.*

46. In a suit between partners for a dissolution and an account, a cross-bill is not necessary to enable the defendant to obtain an account or to obtain relief against the fraud of complainant. Such bill will not be sustained on demurrer. *Johnson v. Buttler*, 789.

ERRORS AND APPEALS. See **BANKRUPTCY**, 3; **BILL OF EXCEPTIONS**; **CERTIORARI**; **CRIMINAL LAW**, 2; **MANDAMUS**, 5; **MORTGAGE**, 21.

1. Second appeals or writs of error will lie in certain cases where it is alleged that the mandate of the Appellate Court had not been properly executed; but in such a case will bring up nothing for re-examination except the proceedings subsequent to the mandate. *Stewart v. Salamon*, 201.

2. An appeal will not lie from the judgment of a Circuit Court in a proceeding by a creditor to prove his demand against the estate of a bankrupt. *Ingersoll v. Bourne*, 201.

3. A cause was tried upon its merits and submitted to the jury upon evidence, not objected to, tending to show a cause of action in plaintiff, and under instructions not excepted to. *Held* (two judges dissenting), that the judgment would not be reversed, because the complaint omitted some averment essential to the cause of action. *Vassau v. Thompson*, 392.

4. An offer to confess judgment duly made in the court below, need not be renewed in the Appellate Court. *Keffell v. Bullock*, 447.

5. Decision of the court upon a motion for a new trial not reviewable on appeal. *Zitzer v. Jones*, 461.

6. Where a jury's finding is wholly unsupported by evidence, it is erroneous as matter of law, but where it is supported by any evidence, however slight, it is a finding of fact, and cannot be reviewed on writ of error. *Conely v. McDonald*, 592.

7. In examining the charge of a court for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. *Congress Spring Co. v. Edgar*, 613.

8. Appellate courts are not inclined to grant a new trial on account of an ambiguity in the charge where it appears that the complaining party made no effort at the trial to have the matter explained. *Id.*

9. The minutes of the evidence in criminal actions, required by the statute to be kept by the judge and filed with the clerk, are no part of the record and can be brought up only by bill of exceptions. The failure of the judge to keep such minutes is no ground for reversal unless excepted to. *Allen v. The State*, 656.

ESCAPE.

1. It is an escape if the sheriff permit the defendant to remain at home on the promise to go the same day to the sheriff's office to give bail. *Richardson v. Rittenhouse*, 130.

2. If the defendant after escape surrenders himself, the plaintiff may elect to sue the sheriff for the escape, or affirm the defendant's custody. *Id.*

3. Such election is made, where, after an escape, the defendant applies for the benefit of the insolvent laws, and the creditor opposes his discharge, whereupon the court remand him into custody. *Id.*

ESTOPPEL. See **AGENT**, 2; **BOUNDARY**, 1; **CORPORATION**, 2, 9; **DEBTOR AND CREDITOR**, 4; **HUSBAND AND WIFE**, 48; **INSURANCE**, 16; **MUNICIPAL BONDS**, 1; **POSSESSION**, 3; **UNITED STATES**, 3.

ESTOPPEL.

1. A trespasser sold certain improvements he had placed on land and delivered possession of the land and the improvements to his vendee. Subsequently he bought the title to the land. *Held*, that he was not estopped from recovering possession of the land from a vendee of his vendee. *Sheffield v. Griffin*, 336.

2. A creditor who levies on an equity of redemption, and has the amount of the encumbrance allowed in his favor in the appraisal of the interest set off to him, cannot set up the invalidity of the encumbrance. *Del. & Hud. Can. Co. v. Bonnell*, 419.

3. A party to proceedings in equity under which title has been acquired, is estopped from disputing such title. *Keene v. Van Reuth*, 453.

4. A widow entitled to both homestead and dower, accepted an assignment of dower, but, being ignorant of her right to a homestead, did not then claim it. As administratrix, she also procured an order for the sale of the estate, but no sale was made. In a proceeding to have her homestead set out: *Held*, that her acts did not constitute either a waiver or an estoppel. *Seek v. Haynes*, 457.

EVIDENCE. See ASSUMPSIT, 1; BANKRUPTCY, 14; BILLS AND NOTES, 5, 11, 12, 17; COMMON CARRIER, 3-5; CRIMINAL LAW, 3, 4, 6-8, 10-13, 18-20, 23-25, 37-39; DEBTOR AND CREDITOR, 1, 12, 16, 17, 20; DEED, 3; EASEMENT, 1, 4; EQUITY, 2, 10; EXPERT; EXTRADITION, 1, 3; FORMER ADJUDICATION, 7; HIGHWAY, 4; HUSBAND AND WIFE, 5; INSANITY, 1; INSURANCE, 12; LIBEL, 1, 3, 7, 10; LIMITATIONS, STATUTE OF, 11, 22; MALICIOUS PROSECUTION, 2, 3; MINES, 5, 6; MORTGAGE, 18; NEGLIGENCE, 5, 6, 28; PARTNERSHIP, 15; POSSESSION, 8; PRESUMPTION; RAILROAD, 1, 9; TELEGRAPH, 1, 2; TRIAL, 1, 2, 4, 5; TRUST, 7; UNITED STATES COURTS, 13; VERDICT, 2; WAIVER, 1; WILL, 1, 5.

1. An order was drawn by A. upon B. in favor of C., in order to carry out a settlement by which B. agreed to pay C. a debt he owed A. *Held*, that the order was admissible in evidence to show the amount B. had assumed to pay. *Wright v. McCully*, 59.

2. Judicial notice will be taken of the powers and authority of public officers, prescribed by law. *State ex rel. Clark v. Gates*, 62.

3. In an action for damages resulting from the sales of intoxicating liquor, under the Ohio statute, it is not necessary to prove the illegal sales beyond a reasonable doubt. *Lyon v. Fleahmann*, 130.

4. In a suit upon a debt, where a release under seal of all demands is set up, parol evidence is inadmissible to show that at the time the release was executed, the releasee told the releasor that the claim in suit should not be included in the release, nor that after the release the releasee admitted the debt to be due. *Drake v. Stark's Ex'r*, 201.

5. An officer's return on an execution is a part of the record of the case. *Esten v. Cooke*, 658.

6. In investigating the genuineness of a written instrument, it is not competent to prove the execution of other papers having no connection with the case, and then, by the testimony of experts, who have compared them with the instrument in question, show that the latter is a forgery. *State v. Clinton*, 267.

7. A note was given for real estate conveyed by absolute deed by the payee to the maker. In a suit on the note, *Held*, that parol evidence was admissible to show that the conveyance was not intended as a sale, but that there was an agreement that the land should be reconveyed, and that the note was not to be paid. *Schindler v. Muhlheiser*, 332.

8. In an action against a railroad, the complaint alleged that when the injury was committed the defendants were running a train at a reckless and grossly negligent and dangerous speed, in violation of a city ordinance. *Held*, that evidence that defendants had wilfully committed the injury was inadmissible. *Pennsylvania Railroad Co. v. Sinclair*, 378.

9. Where, after the trial of a case, a witness dies, and his deposition, taken at the first trial, is accidentally destroyed, testimony of other witnesses as to the substance of his deposition is admissible at the new trial. *Ruch v. City*, 392.

EVIDENCE.

10. The living witness may use his contemporaneous notes of such testimony to refresh his recollection, or if he can testify positively to the accuracy of his notes, they may be put in evidence. *Ruch v. City*, 392.

11. Where an offer is expressly stated to be without prejudice, or where, from the circumstances, it may be inferred that it was, by way of compromise, to prevent litigation, such offer is not evidence as an admission; but if the admission of a fact be made, unless expressly without prejudice, or to induce a compromise, there is no rule of law which would exclude such admission. *Calvert v. Friebus*, 392.

12. Statutes making a tax sale deed *prima facie* evidence of the regularity of the sale do not make such deed evidence of the regularity of the proceedings anterior and necessary to the sale. But under the Act of Congress of 1863, the commissioner's certificate is evidence also of the validity of the sale and title of the purchaser, and can only be affected by proof that the property was not subject to taxes, or that the taxes had been paid, or that the property had been redeemed. *DeTreville v. Smalls*, 392.

13. Under this Act of Congress a certificate of sale is necessary where the United States becomes the purchaser. *Id.*

14. A wife claiming a horse to be a gift from her husband, testified, that after the gift she went to the stable, gave directions for the keep of the horse, and afterwards controlled it. *Held*, admissible as part of the *res gestæ*, and as tending to show delivery. *Davis v. Zimmerman*, 394.

15. A witness who is well acquainted with a person whose character is in question, will be allowed to testify to his general reputation, although he may never have heard it discussed. *State v. Grate*, 454.

16. If a witness is kept away by the adverse party, his testimony taken on a former trial may be given in evidence. *Reynolds v. United States*, 454.

17. A party who has taken the testimony of a witness under a commission, cannot at the trial offer a letter of the witness for the purpose of impeaching his credit. *Sewell v. Gardner*, 456.

18. Where a party has been misled by previous statements of a witness, he may contradict the witness as to any material fact. *Id.*

19. Mistake may be shown by parol as a defence to the specific performance of a written instrument. *Berry v. Whitney*, 463.

20. Interrogatories relating to family relationship, dates of decease and marriages, may well be answered on the basis of family tradition instead of direct personal knowledge. *Van Sickle v. Gibson*, 521.

21. The entry on the books of a corporation of a resolution of appointment of a superintendent is admissible to help establish a claim for salary. *Kalamazoo Works v. Macalister*, 522.

22. Where the issue is whether there was a contract in writing, oral testimony cannot be excluded on the assumption that such writing exists. *Id.*

23. A resolution of appointment is *prima facie* not a contract, and can be withdrawn or altered before acceptance. *Id.*

24. The rule excluding oral evidence to affect a written contract does not apply to a corporate resolution appointing an officer, so as to exclude evidence to show the actual establishment of contract relations under it. *Id.*

25. Even for the purpose of corroborating the testimony of witnesses, an inquiry into facts entirely collateral, cannot be permitted. *Henkle v. McClure*, 522.

26. In case of the loss of a steamboat from some unknown cause, a person conversant with steamboat navigation and familiar with its perils may give his opinion, whether a steamboat, while being navigated with ordinary care, might suddenly spring a leak and sink from some unknown peril. *Insurance Co. v. Tobin*, 523.

27. When the actual effect of a known agency is unknown, and the opinion of one familiar, by actual observation with the matter, is the best testimony the subject affords, such opinion may be received as testimony. *Id.*

28. The statements of a steamboat captain, made in the discharge of his duty while she is in a sinking condition, and he is seeking aid, are *res gestæ*, and competent testimony. *Id.*

EVIDENCE.

29. A note written by plaintiff's attorney before suit, expressing the opinion that defendant is not liable is not admissible in evidence for the defence. *Farmers' Mutual Insurance Co. v. Bowen*, 524.

30. A certificate of an officer charged with the custody of public records that his records show a certain fact, is not competent evidence. *State v. Ruth*, 578.

31. Upon a question as to the proper presentment of a promissory note the court will take judicial notice, not only of the law merchant, but also of the almanac, from which it appears that the last day of grace fell on a Sunday. *Reed v. Wilson*, 585.

32. It must be presumed that the three days of grace allowed by the general law-merchant are also allowed by the law of Pennsylvania, where the note was payable. *Id.*

33. The common usage of any country in reference to its measures should be followed in estimating such measures when referred to in grants. *United States v. Askew*, 586.

34. *It seems* that the opinion of one qualified to speak as to the habits of animals *feræ naturæ*, is admissible as expert testimony; and if not admissible as such it is admissible as matter of common knowledge. *Congress Spring Co. v. Edgar*, 613.

35. Record evidence of satisfaction cannot be contradicted by parol, and is conclusive until modified by some proceeding operating directly on the record. *Id.*

36. Courts do not take judicial notice of foreign laws. The unwritten law of a foreign country must be shown by oral testimony, and the published reports of decisions. *State v. Lung Louis*, 730.

37. The construction of a written agreement a question of law for the court. *Id.*

38. In an action against a gas company for allowing gas to escape into a sewer, from whence it entered plaintiff's green-house: *Held*, that evidence of the presence of gas in other green-houses connected with the same sewer was properly admitted. *Butcher v. Providence Gas Company*, 732.

39. LAWS OF EVIDENCE AND THE SCIENTIFIC INVESTIGATION OF HAND-WRITING, 273.

EXECUTION. See ATTACHMENT; EVIDENCE, 5; MUNICIPAL CORPORATION, 26; SHERIFF, 1.

1. A verbal promise by an execution-creditor to indemnify an officer for selling goods claimed as exempt is not within the Statute of Frauds, nor void as against public policy. *Mays v. Joseph*, 130.

2. Unpublished manuscripts are not leviable property. *Dart v. Woodhouse*, 393.

3. The right of an owner of manuscript to publish it or not belongs to him personally, independent of locality. *Id.*

4. The copyright of a published work cannot be reached by the owner's creditors, unless by statutory authority. *Id.*

5. An officer has no authority for threshing wheat he has levied upon before selling it. *Stilson v. Gibbs*, 589.

6. If an officer with an execution misuses the property levied upon, he is liable to the execution-debtor, and possibly to the creditor also, if the execution fails to satisfy the judgment. *Id.*

7. Where property is exempt from execution, the debtor may sell, mortgage or pledge it, as he pleases, without making it liable to execution. *Washburn v. Goodheart*, 591.

8. Money collected by the sheriff on execution is not subject to levy upon a subsequent execution against the plaintiff. *Kansas, &c., Bank v. Boothe*, 730.

EXECUTORS AND ADMINISTRATORS. See DEBTOR AND CREDITOR, 4; HUSBAND AND WIFE, 29; PROBATE COURTS, 1; SALE, 7; USURY, 3.

1. A specific legacy may remain invested in the stocks set apart by the testator for that purpose. *Ward v. Kitchen*, 332.

EXECUTORS AND ADMINISTRATORS.

2. An executor, apprehending a depreciation in the stocks in which a specific legacy is invested, should protect the estate by converting them. *Ward v. Kitchen*, 332.

3. An administrator cannot maintain a bill to remove a cloud from his testator's lands. *Ryan v. Duncan*, 583.

4. An administrator holding proceeds of a settled estate is chargeable as trustee of one entitled thereto on trustee process summoning him in his personal and not in his representative capacity. *Hoyt v. Christie*, 789.

EXEMPTION. See CONSTITUTIONAL LAW, 29; EXECUTION, 1, 7; STATUTE, 12; TAXATION, 6-8.

EXPERT. See EVIDENCE, 6, 26, 34.

1. An expert cannot be asked for a conclusion upon facts not stated. *Van Dusen v. Newcomer*, 395.

2. The construction of railroad cars, the mode of working them, and the effect of a particular thing on their safety, are questions upon which the opinion of experts is admissible. *Baldwin v. Railroad*, 761.

3. The opinion of experts in handwriting is evidence of low degree. *Mutual Benefit Life Ins. Co. v. Brown*, 201.

EXTRADITION.

1. The certificate of authentication provided for in sect. 5278, U. S. Revised Statutes, not required to be in any particular form. *Ex parte Sheldon*, 393.

2. It is no ground for discharging a fugitive from justice that the indictment, after charging embezzlement, also avers that "so" the defendant committed larceny. *Id.*

3. Where it appears that the fugitive stands charged with embezzlement, the printed statutes of the demanding state may be received to show that embezzlement is a crime. *Id.*

4. After a fugitive has been arrested on an extradition warrant, he will not be discharged on the ground that there was no evidence before the executive issuing the warrant, that the fugitive had fled to avoid prosecution. *Id.*

FACTOR. See EQUITY, 15.

FALSE IMPRISONMENT. See INSANITY, 1.

FALSE PRETENCE. See CRIMINAL LAW, IV.

FEES. See ATTORNEY, 3; OFFICER, 11.

FIXTURES. See LANDLORD AND TENANT, 6.

Manure on land owned by a wife is part of the land as against her husband, although produced in part by stock belonging to the husband. *Norton v. Craig*, 58.

FORCIBLE ENTRY AND DETAINER.

A writ of restitution, in an action of forcible entry and detainer, will not necessarily be unavailing because the persons living upon the land at the institution of the suit were not made defendants. *De Graw v. Prior*, 586.

FOREIGN CORPORATION. See TAXATION, 16.

FOREIGN JUDGMENT.

A foreign judgment is a nullity, if rendered upon a service on defendant made beyond the jurisdiction of the foreign sovereignty. *McEwen v. Zimmer*, 92, and *Note*.

FOREIGN LAW. See EVIDENCE, 36.

FORFEITURE. See INSURANCE, 4, 17-19.

FORMER ADJUDICATION. See TROVER, 2, 4.

1. Where a judgment creditor obtains an order for the examination of the defendant, on supplementary proceedings, and the proceeding is heard upon its merits and dismissed, the case is *res judicata*, as to all matters embraced in Vol. XXVII.—103

FORMER ADJUDICATION.

the judgment of the court, and a new examination can only be asked for as to subsequently-acquired property. *Clarke v. Londrigan*, 130.

2. A decree not appealed from, rendered by the Master of Rolls in England, dismissing a bill, is a bar to a bill filed in the United States against the agent of the English defendant for the same cause and asking the same relief. *Lea v. Deakin*, 322.

3. A judgment is no bar to a subsequent action not between the same parties or their representatives or privies. *Tierney v. Abbott*, 393.

4. A party was made defendant to a foreclosure suit, on the ground that he had a lien subsequent to plaintiff's mortgage, and a decree was rendered against him. *Held*, that he and his assignee *pendente lite* were barred from suing on a mortgage prior to that of the plaintiff. *Case v. Burtholow*, 393.

5. B. had a contract with M., but sued him on the common counts to recover an overpayment. He did not put the contract in issue, though he gave M. credits under it. M. filed no set-off, but immediately sued B. for the whole amount of his bill. *Held*, that the judgment in the first suit did not bar the second. *McEwen v. Bigelow*, 526.

6. A decree in chancery is no bar to a suit not involving the same questions, even though they might have been brought into the first case by a cross-bill. *Nims v. Vaughn*, 591.

7. Judgment in a former suit between the same parties is conclusive of every issue decided therein, and it can be shown by parol evidence what were the issues so tried. *Campbell v. Rankin*, 658.

8. A judgment of a justice, in an action for a wrongful use of a stream, is not conclusive in the trial of an appeal from the justice in a prior action for a prior wrongful use of the stream. *Hazeltine, Adm'r, v. Case*, 663.

FRAUD. See **BANKRUPTCY**, II.; **DEBTOR AND CREDITOR**, 1, 2, 4, 11, 18, 22, 23; **DEED**, 1; **EQUITY**, 12, 26; **FRAUDULENT CONVEYANCES**, 1; **FRAUDS, STATUTE OF**, 4; **HUSBAND AND WIFE**, 36, 38; **INSURANCE**, 14, 23; **LIMITATIONS, STATUTE OF**, 7, 18; **MORTGAGE**, 4; **SURETY**, 3, 5, 7; **TRUST**, 8.

1. A purchaser who co-operates with the vendor in the misappropriation of purchase-money, renders himself liable to the person defrauded. *Bower v. Haddon Blue Stone Co.*, 202.

2. If one fraudulently procures a sham bid on his property, and thereby succeeds in having the land of another sold to pay off a portion of the debt he is equitably bound to pay, such injured party may recover back the sum so lost. *Darst v. Thomas*, 267.

3. Where representations were made by the holder of a mortgage for \$7000, that he had sold the premises to the mortgagor for about \$50,000; that the land was valuable; that the mortgage was good, and the interest paid regularly—all of which were false and fraudulent: *Held*, that they could not be regarded as *simplex commendatio*, and a conveyance of lands obtained thereby was set aside. *Perkins v. Partridge*, 332.

4. The mere delay of a defrauded party in rescinding a contract does not destroy his right, if no innocent third party has acquired any interest, and the wrongdoer is not affected injuriously. *Wicks v. Smith*, 333.

5. Fraudulent representations as to the legal effect of an instrument will avoid it, even if made to one who has actually read it, if unable to judge of its true construction. But the fraud must be contemporaneous, and must consist in obtaining the assent of the party defrauded, by inducing a false impression as to its legal or literal nature and operation. *Berry v. Whitney*, 463.

6. Contracting parties must not act in bad faith to third persons who may be affected by their agreement. *Huxley v. Rice*, 592.

7. One who has sold mortgaged land with warranty, and has covenanted to pay off the mortgage, cannot, as against his grantee, make title in himself under a foreclosure. *Id.*

8. A contract will not be rescinded for fraudulent representations where defendant believed them, and plaintiff had equal opportunity of ascertaining their falsity, and was not prevented by any artifice of defendant. *Mamlock v. Fairbanks*, 658.

FRAUDS, STATUTE OF. See **EQUITY**, 19; **EXECUTION**, 1; **MORTGAGE**, 19.

1. A. being a creditor of B. and also debtor to C. in an equal amount, it was verbally agreed in settlement that B. should pay C. what he owed A. *Held*, not within the Statute of Frauds. *Wright v. McCully*, 59.

2. A delivery of goods to a common carrier not designated by the purchaser, is not such a delivery as will take the sale out of the Statute of Frauds. *Hausman v. Nye*, 194.

3. An original undertaking to retain attorneys to attend to a suit for a third person, may be implied from circumstances. Whether the undertaking is original or collateral, is a question of fact for the jury. *Mashier v. Kitchell*, 267.

4. A parol lease for more than three years, being within the Statute of Frauds, it is not a fraud to refuse to execute it. *Sausser v. Steinmetz*, 355.

5. An action lies for the breach of such agreement, but the damages recoverable are such only as result directly from the breach. *Id.*

6. In the absence of evidence that the lessor was prevented from leasing to another person, and no claim being made for money expended in improvements or repairs, his damages must be merely nominal. *Id.*

7. Application of Statute of Frauds to contracts for sale or lease of lands. *Id. Note.*

8. A contract by the owner of a house, to pay a sub-contractor out of funds coming to the contractor for building the house, need not be in writing, under the Statute of Frauds. *Estabrook v. Gebhart*, 522.

9. An agreement not to set up a certain business during the joint lives of the parties, is "not to be performed within the space of one year," within the meaning of the 4th section of the Statute of Frauds. *Davey v. Shannon*, 554.

10. Meaning of the words "not to be performed" discussed. *Id. Note.*

11. Where defendant after a physician had made three visits to his son-in-law, undertook to pay the physician, the promise is an original undertaking as to subsequent but not as to previous services. *King v. Edmiston*, 586.

12. A verbal promise to pay the debt of another, is void, if made to the creditor; but not if made to the debtor. *Pratt v. Bates*, 586.

13. Plaintiff entered defendant's service under a verbal contract for a year, to commence two days after the date of the contract. Before the expiration of the year, defendant dismissed him. *Held*, that the verbal contract was not absolutely void by the Statute of Frauds, that no new contract could be implied from any acts done under such verbal contract; and that the principles of equity, as to part performance, in contracts relating to land, were not to be extended to such contracts as the above. *Britain v. Rossiter*, 716, and *Note.*

14. *Carrington v. Roots*, 2 M. & W. 248, and *Reade v. Lamb*, 6 Exch. 130, commented on; *Snelling v. Lord Huntingfield*, 1 C., M. & R. 20, followed. *Id.*

FRAUDULENT CONVEYANCE. See **DEBTOR AND CREDITOR**, 1, 2, 4, 8, 18; **HUSBAND AND WIFE**, 37; **TRUST AND TRUSTEE**, 10.

SALES AND CONVEYANCES WITHOUT DELIVERY OF POSSESSION, 137.

GARNISHMENT. See **ATTACHMENT**.**GOVERNMENT.** See **CONSTITUTIONAL LAW**; **INSOLVENCY**, 1; **UNITED STATES**.**GUARANTY.** See **BILLS AND NOTES**, 18; **SURETY**.

1. B. guaranteed the payment of M.'s rent "so long as said M. shall occupy said premises." *Held*, that the word "occupy" denoted the whole period of tenancy. *Morrow v. Brady*, 730.

2. A letter as follows: "Please send my son the lumber he asks for, and it will be all right," is a guaranty that the lumber furnished at the time it is presented will be paid for. *Birdsall v. Heacock*, 751.

3. Such guaranty is not continuing. *Id.*

4. Subsequent payments will be applied to purchases covered by the guaranty. *Id.*

5. B. sold property to W., taking notes therefor, signed by W. and by H. as surety, agreeing that if W. should sell the property, the indebtedness

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might be transferred to his purchasers. *W.* sold the property. *B.* suggested that as it would take some time to compute the notes, it would be as well for the purchasers to assume the debt by writing on the notes themselves, whereupon they wrote on the back of each note, "We hereby assume and agree to pay this note," and signed the same. *Held*, that *H.* and *W.* were relieved from liability. *Nelson v. Wells*, 790.

6. Distinguished from suretyship. *Note to Birdsall v. Heacock*, 757.

7. What constitutes a continuing guaranty. *Id.*

8. When notice to guarantor is required. *Id.*

9. When acceptance of guaranty is necessary. *Id.*

GUARDIAN AND WARD. See ABATEMENT, 1.

1. One standing in the relation of a parent and guardian in fact of a minor, having the control of such minor and of his property, is bound to the most scrupulous good faith; and where, on such minor's coming of age, he attempts to make a settlement with him, a court of equity will examine the transaction with extreme jealousy. *Berkmeyer v. Kellerman*, 203.

2. Where a party occupying such a relation claims any advantage from such settlement, the burden of proof is on him to show that it was fair and equitable. *Id.*

3. A conveyance by such minor, on the day he comes of age, of his real estate to the persons occupying such relations, can only be upheld in a court of equity by clear proof that it is just and equitable. *Id.*

HABEAS CORPUS. See CONTEMPT, 1.

HANDWRITING. See EVIDENCE, 6, 39; EXPERT, 3.

HARBOR LINE. See WATERS AND WATERCOURSES, 5.

HEIR. See INSURANCE, 8.

HIGHWAY. See DAMAGES, 2, 7; MUNICIPAL CORPORATION, 3; NUISANCE, 7; STREET.

1. A town is not required to render its roads passable for their entire width if sufficient width is passable to render them safe and convenient. *Perkins v. Inhabitants of Fayette*, 59.

2. A town may put or leave obstructions on the side of a way provided they are so far from the travelled track that teams may pass without danger. *Id.*

3. A town is not liable for an accident which is the combined effect of the fright of a horse at meeting cows with boards on their horns and a defect in the highway. *Moulton v. Sandford*, 51 Me. 127, re-affirmed. *Id.*

4. To show title to a public road by dedication there should be satisfactory proof either of an intention to dedicate, or of such acts and declarations as should stop the owner from denying such intention. *Kyle v. Town of Logan*, 267.

5. No action lies against a municipal corporation for allowing the ordinary flow of surface-water to escape from a highway on to adjacent land. Nor for the results of such usual changes of grade as must have been contemplated and paid for at the layout of the highway. *Wakefield v. Newell*, 658.

6. A municipal corporation has the same powers over its highways in respect to surface-water as an individual has over his land. *Inman v. Tripp*, 11 R. I. 520, explained and affirmed. *Id.*

HOMESTEAD. See DEED, 2; ESTOPPEL, 4; HUSBAND AND WIFE, 36.

Where a mortgagor abandons his homestead the mortgage becomes operative thereon, and it is immaterial whether he knew that the mortgage contained a clause releasing the homestead, or whether his wife signed the same. *Cobb v. Smith*, 586.

HUSBAND AND WIFE. See ACTION, 7; CRIMINAL LAW, 20, 25, 29, 37; ESTOPPEL, 4; EVIDENCE, 14; FIXTURES, 1; SPECIFIC PERFORMANCE, 4; TRUST, 4, 8; VENDOR AND PURCHASER, 12.

HUSBAND AND WIFE.

I. *Marriage, Divorce and Alimony.* See *infra*, 35 ; CONSTITUTIONAL LAW, 15 ; CONTEMPT, 1.

1. If a wife, without justification, refuses for two years to follow her husband to a new domicile, he is entitled to a divorce. *Kennedy v. Kennedy*, 267.

2. The English Divorce Court has jurisdiction to grant a divorce against a foreigner. *Niboyet v. Niboyet*, 539.

3. A marriage was solemnized at Gibraltar between a Frenchman and an Englishwoman. The husband resided for several years in England, but being a consul for France he retained his domicile of origin. The wife presented a petition for a divorce, alleging adultery committed in England and desertion. The husband appeared under protest, and prayed to be dismissed. *Held*, that the court had jurisdiction to grant a divorce. *Id.*

4. Whether domicile is necessary to create jurisdiction to dissolve a foreign marriage, discussed. *Id.* Note.

5. When at the commencement of the cohabitation and conduct, from which it is sought to prove a marriage in fact, there was in fact no such marriage, the mere continuance of such cohabitation and conduct is not sufficient to prove a subsequent marriage. *Williams v. Williams*, 629.

6. Such contract may be proved by circumstances, but they must be such as to exclude the inference or presumption that the former relation continued. *Id.*

7. Presumption arising from cohabitation where the original relation was unlawful. *Id.* Note.

II. *Curtsey and Dower.* See *infra*, 17.

8. Whether a widow can take under provisions in her husband's will, and also under an ante-nuptial contract, whereby her dower is barred, depends on the intention of the testator. *Bowen v. Bowen*, 131.

9. Where a husband owns an undivided moiety of land and resides upon it with his family, the wife is a necessary party to an action of partition. *Wheat v. Burgess*, 333.

10. A judgment in such action decreeing that the land be set-off to the husband subject to liens, and that if the liens were not paid in a short time, the land should be sold to pay them, is void as against the wife in the absence of jurisdiction of her person by the court. *Id.*

11. Where, in a suit upon a vendor's lien for purchase-money, to which the vendee and his wife, and also the holder of a subsequent mortgage by the vendee alone, are defendants, and the proceeds of sale are more than the vendor's claim, the wife is entitled, as against such mortgagees, to assert her contingent right of dower. *Unger v. Leiter*, 523.

12. But such right must be protected in a mode which will not interfere with the right of the mortgagee to subject the whole estate of the husband to the satisfaction of the mortgage. *Id.*

13. Therefore, when the surplus is insufficient to discharge fully the mortgage-debt, the court should not direct one-third of the surplus to be put on interest to secure the dower. *Id.*

14. The proper course is to award to the wife the value of her dower, to be ascertained by reference to the tables of recognised authority in connection with the state of health, and constitutional vigor of the wife and her husband. *Id.*

15. Where a husband has conveyed land, and his grantee has conveyed it in parcels to several persons, the wife is entitled to dower out of any parcel according to its present value, excluding all improvements made on that parcel, but including its increased value on account of improvements made on the other parcels. *Boyd v. Carlton*, 774.

16. As regards a right to dower, there is no difference between a conveyance to a stranger for a valuable consideration, and one to a child for a good consideration. And in estimating the value of the land, only the improvements at the time of the conveyance are to be regarded. *Stokey v. Stokey*, 789.

III. *Separate Estate.* See *infra*, 39.

HUSBAND AND WIFE.

17. A release of the wife's inchoate right of dower a valid consideration for a conveyance of property to her. *Singree v. Welch*, 202.

18. Such conveyance not fraudulent as to the husband's creditors, unless the consideration is so disproportioned to the value of the dower as to be unreasonable. *Id.*

19. This value being difficult to estimate, the courts will not pronounce the transaction fraudulent because the wife received a sum greater than her dower, if the facts do not show *mala fides*. *Id.*

20. A post-nuptial contract, made upon sufficient consideration, and wholly or partially executed, will be sustained in equity. *Kesner v. Trigg*, 202.

21. The separate equitable estate of a wife is subject to an equitable charge for her debts, and if she declares in writing her intention to charge it or does so verbally, and her contract is for the benefit of herself or her estate, the charge is valid. *Elliott v. Gower*, 638.

22. A married woman, as to property settled to her separate use, is to be regarded as a *feme sole*, and may dispose of her personal property or the profits of her real estate, unless restrained by the instrument creating the estate. *Radford v. Carville*, 659.

23. Such restraint must be expressed or so clearly indicated as to be equivalent to an express restraint. *Id.*

24. The liability of such estate to the payment of the wife's debts incurred during coverture, is also an incident which can only be taken away by express words or clear intent. *Id.*

25. These incidents do not extend to the corpus of her real estate. *Id.*

26. The corpus can only be affected by a vendor's lien when such lien has been reserved, or by a conveyance in which the wife has joined with her husband after a separate examination. *Id.*

27. The consideration of a contract for which her separate estate is liable need not enure to her own benefit, but may be any consideration which would support the contract if she were a *feme sole*. *Id.*

28. But her estate cannot be made liable for the debt of her husband or of any other person, unless by contract in writing, signed by her or by some one authorized by her. *Id.*

29. The receipt by an agent, appointed by husband and wife, of money forming part of an estate, of which the wife is administratrix, amounts to a reduction into possession by the husband of the wife's distributive share of the money. *Huntley v. Griffith*, F. Moore 452; *Goldsborough* 159, followed. *In re Barber*, 790.

IV. *Contracts, Conveyances and Liabilities.* See *supra*, 8, 20.

30. By the laws of Iowa the wife has similar property rights and is chargeable with similar obligations with the husband under like circumstances, and coverture is no defence against the enforcement of the rights of others growing out of her contracts. *Spafford v. Warren*, 59.

31. The wife may ratify a defective and void conveyance of her homestead, in all cases where her husband could ratify such an act. *Id.*

32. Where a conveyance of the homestead by the wife was void, but she surrendered possession of the property voluntarily, made no objection to the grantee's title when in her presence he offered to sell it, and permitted him to remain in quiet possession for more than three years and make improvements without protest: *Held*, that her conduct amounted to a ratification of the deed. *Id.*

33. A husband is not liable for necessities furnished to his wife, pending a suit in divorce, in which alimony had been decreed and regularly paid by him. *Hare v. Gibson*, 59.

34. The persons dealing with the wife held chargeable with notice of the allotment and payment of the alimony. *Id.*

35. The adequacy of the alimony cannot be collaterally drawn in question, especially by strangers to the divorce suit. *Id.*

36. Where a husband and wife are induced by fraud to convey a homestead, the subsequent affirmance by the husband of the conveyance will not affect the right of the wife to rescind. *Wicks v. Smith*, 333.

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37. Open and visible change of possession can hardly be required to establish the fact of a gift from a husband to his wife when they are living together. *Davis v. Zimmerman*, 394.

38. The only question is whether she establishes her right by a fair preponderance of evidence. But it is proper to consider the relation and the facility with which fraud may be perpetrated. *Id.*

39. Where property is granted to a husband and wife, they are not tenants in common, nor joint tenants. If the husband die, the property goes to the wife by survivorship. *Ins Co. v. Resh*, 396.

40. The authority of a wife to pledge the credit of her husband is not an inherent, but a delegated authority. *Eastland v. Burchell*, 412.

41. Where a wife leaves her husband without cause she carries no implied authority to bind him, even for necessities; but when she is driven away by his fault, she becomes of necessity his agent to supply her wants. *Id.*

42. Where the separation is by consent, and by its terms the wife receives a fixed income, she cannot pledge her husband's credit for necessities. *Id.*

43. Liability of husband for wife's contracts. *Id. Note.*

44. An indebtedness incurred by a married woman, for the benefit of herself or her property, and upon its credit, and the giving of a note therefor, are facts from which a court of equity may enforce a charge against such property. *Rice v. Railroad Co.*, 522.

45. But an intention to charge such property will not be implied, merely from the giving of a note. *Id.*

46. Neither will her property be made liable in the absence of a contract valid in law to bind the same, or of such circumstances as make it equitable. *Id.*

47. When a married woman subscribes to stock of a corporation, but makes default in payment, equity will not charge her property in the absence of proof that either party dealt on the credit of such property. *Id.*

48. A wife is not estopped from asserting her title to her personal property against an innocent purchaser from her husband when she was not present at the sale, and had no opportunity of giving notice of her rights. *Klein v. Seibold*, 730.

49. The Illinois statute as to contracts of a wife empowers her to sign a note as surety for her husband. *Wright v. Remington*, 743.

50. Such contract may be enforced in New Jersey. *Id.*

51. Where the payee induced the wife to sign by procuring the husband to threaten suicide if she did not, this does not amount to duress. *Id.*

INCUMBRANCE. See ENCUMBRANCE.

INDICTMENT. See CONSTITUTIONAL LAW, 7; CRIMINAL LAW, 5, 8, 14-16, 31, 34, 43; EXTRADITION, 2.

INFANT. See GUARDIAN AND WARD; PARENT AND CHILD.

1. Action must be brought by his guardian or next friend, who alone is liable for the costs. *Keffell v. Bullock*, 447.

2. Not liable for costs after arriving at full age, in an action brought without a guardian or next friend, if, on reaching his majority, he disclaim all benefit from the proceeding, and refuse to proceed. *Id.*

3. By the legislation in Nebraska all the disabilities of infancy, as they exist by the common law, are fully recognised. *Id.*

4. If an infant buys a chattel, and after he comes of age converts it to his own use, that is a ratification which makes him liable. *Robinson v. Hoskins*, 510.

5. A sale of the chattel after becoming of age is a ratification, and such ratification does away with the necessity of a written promise to pay the debt. *Id.*

6. Where an infant purchases a chattel and the vendor who has retained a lien on it for an unpaid balance of the price, retakes it, the infant may recover back the money paid, although the use which he has had of the chattel was of greater value than such money, and although at the time of purchase he represented himself to be of full age. *Whitecomb v. Joslyn*, 790.

INFORMATION. See **CRIMINAL LAW**, 26.

INJUNCTION. See **EQUITY**, 22, 32; **MANDAMUS**, 6; **MORTGAGE**, 10, 16; **NUISANCE**, 3; **TAXATION**, 15.

1. County commissioners executed a contract for the erection of county buildings, which was *ultra vires*. *Held*, that they might be enjoined from erecting said buildings, and from drawing warrants on the county treasurer therefor. *State v. Board of County Com.*, 390.

2. The sufficiency of an injunction bill cannot be reviewed in collateral proceedings. *People v. Circuit Judge*, 459.

3. Whether injunction to restrain threatened injury is matter of right, *quære*. *Hall v. Rood*, 524.

4. Not granted where such relief is disproportionate to the injury. *Id.*

5. A wooden building encroached six inches on a private alley for more than twenty years. The owner attempted to veneer it with brick, whereby it would encroach three inches more. It did not appear that the encroachment would materially injure the right of way. *Held*, that an injunction would not be granted. *Id.*

6. Where the defendant is present when an order for an injunction is granted, and has notice, he is bound to observe it as if the writ were issued; and on dismissal of the bill damages may be properly assessed. *Danville Banking and Trust Co. v. Parks*, 587.

7. A committee of a club, in proceeding against a member for alleged misconduct, are bound to act according to the ordinary rules of justice, and if they act otherwise, they may be restrained by injunction. *Fisher v. Keane*, 788.

INNKEEPER.

1. Where a safe for the keeping of articles is provided, and notices given, as required by statute, a loser failing to take the benefit of the protection must bear his own loss. *Elcox v. Hill*, 395.

2. Where the loss is occasioned by the personal negligence of the guest, the innkeeper is not liable. *Id.*

INSANITY.

1. In an action for false imprisonment, brought by a patient in an insane asylum against the superintendent, the broadest latitude should be allowed in showing the jury the acts, words and appearance of the patient. *Van Dusen v. Newcomer*, 395.

2. One cannot lawfully be placed or detained in an insane asylum against his will, unless actually insane. *Id.*

3. The confinement of a person dangerously insane is always justifiable. *Id.*

4. Whether the superintendent of an asylum is liable for detaining a sane person whom in good faith he believes to be insane, *quære*. *Id.*

INSOLVENCY. See **BANK**, 1; **DEBTOR AND CREDITOR**, 9, 17; **RECEIVER**, 3, 4; **SPECIFIC PERFORMANCE**, 5.

New Jersey does not possess the crown's common-law prerogative to have its debts paid in preference to other debts. *Board of Freeholders v. State Bank*, 268.

INSURANCE. See **CORPORATION**, 7; **EQUITY**, 1.

I. *Generally.*

1. A policy-holder is not entitled to a present action for the sum insured, because the company wrongfully declare the policy void and refuse to receive the premiums. *Day v. Connecticut Gen. Ins. Co.*, 47.

2. In such case the holder may either 1. Sue for the present value of the policy; 2. Continue to tender premiums, and after death of the life insured, sue for the amount of the policy; or 3. Go into equity to have the policy decreed in force. *Id.*

3. *Hochster v. De la Tour*, 2 E. & B. 678, and *Frost v. Knight*, Law Rep. 7 Exch. 111, reviewed and distinguished. *Id.*

4. When a forfeiture is alleged on merely technical grounds, the contract will be upheld, if it can be without violating any principle of law. *Appleton Iron Co. v. Assurance Co.*, 395.

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5. Both mortgagor and mortgagee of chattels have insurable interests therein; and a provision that any loss is payable to the mortgagee is valid. *Appleton Iron Co. v. Assurance Co.*, 395.

6. Where the interest of the mortgagees exceeded the insurance, the mortgagor could not by a transfer of the title work a forfeiture. *Id.*

7. An agent who issues a policy and takes a premium after the company's authority to do business in the state has been revoked, is liable to return the premium, notwithstanding that he was ignorant of the revocation, and that the four weeks' notice thereof required by law, had not been given by the state superintendent. *McCutcheon v. Rivers*, 587.

8. A policy payable to the "legal heirs" of the person insured, is payable to his children to the exclusion of his widow. *Gauch v. Ins. Co.*, 587.

9. SUBROGATION BY THE INSURER TO THE INTEREST OF THE MORTGAGEE, 737.

II. Conditions, Representations, &c. See *infra*, 24.

10. Cotton while guarded by Federal soldiers was insured, the policy stipulating for notice to the company of any change in the situation or circumstances affecting the risk or in the title to the property. Subsequently it was seized without lawful authority by Federal officials, who retained exclusive control until the loss. *Held*, that the owner was not bound to give notice of the change of control. *Snell v. Insurance Co.*, 79.

11. A policy stipulated for immediate notice of loss. The insured property was burned Oct. 9th 1871, in the Chicago fire, and notice was given Nov. 13th 1871. *Held*, to be in time in view of the derangement of business caused by that fire. *Ins. Co. v. McGinnis*, 268.

12. Parol evidence admissible to show that the assured stated to the solicitor receiving the application, that there was an encumbrance upon the property. *Boetcher v. Hawkeye Ins. Co.*, 268.

13. Notice to a soliciting agent, who is authorized to fill up applications for the assured, to receive premiums and forward the same with the application to the company, and whose agency thereupon ceases, is notice to the company. *Id.*

14. A policy contained a clause that the agent taking the application was the agent of the assured, but the latter was not advised of this fact. *Held*, that the insertion of the clause was a fraud upon the assured, of which the company could not take advantage. *Id.*

15. A mortgagor insured chattels, the loss payable to the mortgagee, and the policy providing that any change in title or possession without notice should avoid the policy. The mortgagor was adjudged bankrupt, and an assignment made by order of court to a trustee: *Held*, that the policy was not avoided. *Appleton Iron Co. v. Ins. Co.*, 316.

16. Where an insurance company agrees to pay the loss to mortgagees, it is estopped from saying that the mortgagor had no insurable interest. *Id.*

17. Whether a clause of forfeiture upon a transfer of the insured property (either voluntary or by judicial process), is not void as against public policy, *quære*. *Appleton Iron Co. v. Assurance Co.*, 395.

18. Such forfeiture may be waived by laches of the insurer, and if the latter intended to rely on a forfeiture by the mortgagor, good faith required them to notify the mortgagee. *Id.*

19. A policy contained a clause of forfeiture for the omission to state any material fact: *Held*, that it was avoided by the statement of the insured that his title to the property was absolute, when in fact it was held by him and his wife. *Etna Ins. Co. v. Resh*, 396.

20. The existence of any substantial encumbrance upon property is a material fact, whether the statements of the insured are made warranties or not. *Id.*

21. A policy provided that after the payment of two annual premiums it might be exchanged for a paid-up policy. It also provided for a forfeiture of the policy and all previous payments upon the non-payment of any premium on the day appointed: *Held*, that the right to exchange for a paid-up

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policy was limited to the time during which the policy was in force. *Bussing v. Ins. Co.*, 457.

22. Where a mutual insurance company imposes forfeiture, in case a loss occurs while its assessments are still unpaid, but its local agent receives past due assessments with knowledge of a loss, and forwards them to the company without notifying them of it, and they receive them, and two or three weeks afterwards order the loss to be paid when adjusted, they cannot afterward refuse payment. *Farmers' Mut. Fire Ins. Co. v. Bowen*, 524.

23. In answer to a question whether a proposal had ever been made on the applicant's life at any other offices, he answered that he was insured in two offices at ordinary rates. The policy was issued, and afterwards the company discovered that the life of the insured had been declined by several offices: *Held*, that there had been a material concealment which would avoid the policy. *London Assurance v. Mansel*, 790.

III. Marine.

24. The memorandum clause in an open policy on three barge loads of wheat, described the risk as 39,085 bushels bulk wheat at \$1.15 per bushel—sum \$449.45; rate 1; premium \$449.45; to be conveyed from Lansing to St. Louis by steamer and barges. In an action upon the policy, it was held that the wheat was insured in bulk, and not in packages, either of one bushel or one barge each; that a clause in the policy, "Each package shall be subject to its own average," did not apply to such a risk; and that, in determining the percentage of partial loss, the proportion between the entire actual loss and the value of the entire shipment must be ascertained. *Haenschen v. Franklin Ins. Co.*, 60.

25. When a steamboat is seaworthy at the time she was insured, her seaworthiness is presumed to continue; but when she springs a dangerous leak, without apparent cause, a new presumption arises—that of unseaworthiness; yet, as this is not conclusive, the owners are not required to show the identical cause of her loss, but may show a probable cause. *Insurance Co. v. Tobin*, 523.

INTEREST. See MORTGAGE, 10, 14; NATIONAL BANK, 2, 4; TRUST AND TRUSTEE, 1; USURY.

1. On a demand note, with interest at ten per cent., that rate is recoverable to the date of verdict, when damages are assessed by a jury, and to the date of judgment, when a default is entered. *Paine v. Caswell*, 60.

2. Bonds were executed and made payable in New York. *Held* (in Iowa), that delinquent interest thereon drew interest at the rate of six per cent. Following *Preston v. Walker*, 26 Iowa 205. *Burrows v. Stryker*, 268.

3. A decree will draw only the rate of interest of the debt, and if a part of the debts drew one rate and a part another, the decree will draw different rates. *Id.*

INTERNATIONAL LAW. See ADMIRALTY, 2; EXTRADITION; NATURALIZATION.

1. The division of an empire does not of itself destroy rights of property held by the citizens of its different parts, though situated in a different division from that in which they may reside. *Airhart v. DeMessieu*, 587.

2. A citizen of Mexico was not divested of his title to lands in Texas by the revolution, nor by the constitution or laws subsequently adopted. *Id.*

INTERPLEADER. See SHERIFF, 3.

INTOXICATING LIQUORS. See CONSTITUTIONAL LAW, 5, 8, 23; CRIMINAL LAW, 24, 40; EVIDENCE, 3.

In an action by a married woman for an injury to her means of support in consequence of the intoxication of her husband, it is not error for the court to refuse to charge that "if the jury award the plaintiff any amount by way of exemplary damages, they should not consider the fact, if such they find it to be, that certain of the illegal sales were made on Sunday." *Sibila v. Bahney*, 457.

INTOXICATION. See **CRIMINAL LAW**, 3, 4.

Effect of evidence of intoxication in criminal prosecutions. *Note to State v. Tatro*, 159.

JOINDER OF ACTIONS. See **BILLS AND NOTES**, 20.**JOINT-DEBTORS.** See **BILLS AND NOTES**, 10; **LIMITATIONS, STATUTE OF**, 11.

1. An agreement by which a creditor accepts the individual note of one of two partners or joint-debtors in payment of the joint-debt, is founded on a valid consideration, and will discharge the debt. *Bowyer v. Martin*, 729.

2. Such agreement would be equally binding if it were to take the individual note of each partner for his portion of the debt. *Id.*

JOINT-TENANT. See **HUSBAND AND WIFE**, 39.**JUDGMENT.** See **CONFLICT OF LAWS**, 1; **EQUITY**, 26; **FOREIGN JUDGMENT; JURISDICTION**, 2; **SET-OFF**, 1, 7.

1. The mere fact that a judgment by default in trespass is much greater than it ought to have been, will not of itself justify a court of equity in setting it aside. *Walker v. Shreve*, 131.

2. Will not affect a *bona fide* conveyance for value, nor a charge in equity made before it is entered up. *Dyson v. Simmons*, 587.

3. The court cannot, as a condition to opening a confessed judgment, require the defendant to pay the money into court, but may allow the judgment to stand as security until the trial of the issues raised. *Page v. Wallace*, 268.

JUDICIAL SALE. See **SHERIFF'S SALE**.**JURISDICTION.** See **COURTS**, 1; **EQUITY**, 5, 15, 22; **FOREIGN JUDGMENT**, 1; **HUSBAND AND WIFE**, 4; **RAILROAD**, 17; **TAXATION**, 15; **UNITED STATES COURTS**, 2, 6-9.

1. A declaration set up in different counts separate demands, each below the jurisdiction of the court. *Held*, that the court had no jurisdiction, although the demands in the aggregate were of sufficient amount. *Camp v. Stevens*, 128.

2. After judgment in such suit, it is not too late to move to strike off the case for want of jurisdiction. *Id.*

3. By statute, Ness county, Kansas, was attached to Pawnee county for judicial purposes, until it should be organized. The law provided that the county should be organized from and after the qualification of certain officers to be appointed by the governor. On the trial of a party in Pawnee county court, charged with committing an offence in Ness county, *held*, that in the absence of any evidence of the organization of Ness county, the court had jurisdiction. *State v. Ruth*, 578.

4. Illegality in the service of process, by which jurisdiction is obtained, is not waived by the special appearance of defendant to move to set aside the service, nor after such motion is denied, by his answering to the merits. *Harkness v. Hyde*, 584.

5. Whenever rights or remedies are dependent on statutes, the jurisdiction as between the law side and the equity side of the federal courts, must be determined by the essential character of the case. *Van Norden v. Morton*, 660.

JUROR AND JURY. See **NEW TRIAL**, 4; **VERDICT**, 3.

1. Where, in a capital case, a person not summoned as a juror personates one who was returned on the venire, the verdict will be set aside. *McGill v. The State*, 455.

2. The improper overruling of an objection to a juror, is cured if it appear that he was not on the jury when the case was tried and that the party's right of peremptory challenge was not abridged. *Buht v. Panjaud*, 660.

3. One offered as a juror is not compelled to disclose his guilt of a crime, which would disqualify him. *Id.*

JUSTICE OF THE PEACE. See **SET-OFF**, 7.

Receiving money in his official capacity and depositing it in his private bank account, is liable in case of failure of the bank. *Shaw v. Bauman*, 400.

LACHES. See ACCOUNT, 1; FRAUD, 4; MANDAMUS, 2.

LAND.

THE LAND LAW OF GREAT BRITAIN, WITH ESPECIAL REFERENCE TO THE RIGHTS OF ALIENS, 465.

LANDLORD AND TENANT. See GUARANTY, 1; UNITED STATES, 1.

1. By taking a mortgage which, from a failure to record it, cannot be enforced, a landlord does not lose his landlord's lien upon the property of his tenant. *Pitkins v. Fletcher*, 61.

2. Leases must receive a reasonable construction from the language employed, without the aid of extrinsic evidence beyond what may be necessary to identify the premises and to disclose the circumstances surrounding the transaction. *Bradley v. The United States*, 396.

3. The grant of an estate expectant on the determination of a lease for years, passes to the grantee the rents reserved in the lease. *King v. Housatonic Railroad Co.*, 458.

4. Notice of the grant to the tenant is sufficient to entitle the grantee to recover the rents. *Id.*

5. Where the grant of the reversion is by way of mortgage, the mortgagee may take the rents or not at his election. But the rents in arrear at the time the mortgage was executed, belong to the mortgagor. *Id.*

6. A tenant who removes at expiration of term, without reservation of a right to remove fixtures remaining on the premises, abandons all right in them. *Jostyn v. McCabe*, 711.

7. Where the tenant asked permission to leave the fixtures on the premises, to which the landlord replied that he was willing, as the fixtures might help him to rent the store. *Held*, that this did not imply a license to re-enter and remove them. *Id.*

8. Right of tenant to remove fixtures discussed. *Id. Note.*

9. A notice to quit held not invalidated by the addition of the following clause: "And I hereby further give you notice that should you retain possession of the premises after the day before mentioned, the annual rental of the premises now held by you from me will be 160/., payable quarterly in advance." *Ahearn v. Bellman*. 730.

LATERAL SUPPORT. See SUPPORT.

LEASE. FRAUDS, STATUTE OF, 4; LANDLORD AND TENANT, 2.

LEGACY AND LEGATEE. See EXECUTORS AND ADMINISTRATORS, 1; WILL, 7.

LEGAL REPRESENTATIVES.

The meaning of this term is a question of intention to be gathered from all the circumstances. *Bowman v. Long*, 791.

LIBEL. See CRIMINAL LAW, VI.

1. In an action for libel, where defendant justifies a charge of crime, the defence must be established to the entire satisfaction of the jury, but need not be established with the certainty required to sustain an indictment. *Baker v. Kansas City Times Co.*, 101.

2. In such a case, where there are acts or statements of the defendant fairly admitting of two meanings, the jury should apply the meaning leading to innocence rather than guilt. *Id.*

3. But a party failing to establish his plea of justification, may show, in mitigation of damages, that he acted without malice. *Id.*

4. Absence of actual malice is no bar to an action of libel where the publication is not privileged. *Id.*

5. Where a plea of justification is not sustained, it is the duty of the jury to award damages to the plaintiff, but the amount thereof should be left to their discretion. *Id.*

6. Duty of court to lay down rules to guide the jury in assessing damages. *Id. Note.*

7. Where the defendant gives notice of a general justification only, he must prove the truth of the statements precisely as charged. *Bailey v. Kalamazoo Publishing Co.*, 396.

LIBEL.

8. Courts take judicial notice of the meaning of current phrases. *Bailey v. Kalamazoo Publishing Co.*, 396.

9. General reputation is sufficient to justify the charge that a lawyer is a pettifogging shyster. *Id.*

10. Evidence to justify statements published after the commencement of a suit for libel not admissible. *Id.*

11. It is not error to allow the defendant to show on what ground he based his information. *Id.*

12. Damages for a libel upon a candidate for public office are reduced to a minimum if the libel results from an honest mistake in an honest effort to enlighten the public. *Id.*

13. Where there is only a technical variance between the charge and its justification, proof of the belief of the party should be received. *Id.*

LIEN. See JUDGMENT, 2; LANDLORD AND TENANT, 1; MECHANICS' LIEN; MORTGAGE, 5; UNITED STATES COURTS, 1; VENDOR AND PURCHASER, 10-12.

1. The delivery of a warehouse receipt for a given number of barrels of pork, parcel of a larger lot, where there is nothing to indicate the specific barrels embraced in the receipt, will not create a lien in favor of the holder. *Sawyer v. Taggart*, 222.

2. Lien of finder of lost chattel, for compensation for finding it, or expense incurred in care of it. *Note to Bowen v. Sullivan*, 699.

LIMITATIONS, STATUTE OF. CORPORATION, 7; MANDAMUS, 1; MORTGAGE, 7.

1. Temporary interruption to actual residence on land caused by the destruction of the dwelling-house, but without any abandonment of possession, is not a bar to the running of the statute. *Clark v. Potter*, 62.

2. Not a bar to an action for an account between partners, unless account closed for six years. *Stout v. Ex'rs of Seabrook*, 198.

3. The administrator of a sheriff sued upon a note given to the sheriff for land sold. Afterwards, and more than ten years after the maturity of the note, the sureties of the sheriff who had been compelled to pay the amount for which the land had been sold, substituted themselves as plaintiffs in the action. *Held*, that they were barred by the statute, although the suit as originally brought, was not barred. *Sweet v. Jeffries*, 269.

4. When it appears on the face of the bill that the complainant's right is barred, advantage may be taken of the Statute of Limitations by demurrer. *Partridge v. Wells*, 333.

5. The bar of the statute is as perfect an answer in equity as at law. *Id.*

6. The statute does not apply to such trusts as are not cognisable at law, but only in equity. *Id.*

7. It is no answer to a plea of the statute, that the cause of action was fraudulently concealed, and that the suit was brought within the time limited after discovery. *Andreae v. Redfield*, 458.

8. Whenever the act or acts necessary to constitute a criminal withholding by an agent of pension money have transpired, the statute begins to run against the prosecution. *United States v. Irvine*, 458.

9. One joint maker of a note shall not lose the benefit of the statute by payments made by another. *Rogers v. Anderson*, 458.

10. Unexplained endorsements and endorsements by the payee will not take a case out of the statute. *Id.*

11. The admissions of one joint maker are not evidence against another. *Id.*

12. The running of the statute is not interrupted by the death of the claimant, and the descent of the right to minors. *Harris v. McGovern*, 458.

13. When the statute begins to run, it will not be impeded by any subsequent disability. *Id.*

14. A state statute cannot bar the United States. *United States v. Thompson*, 459.

15. Applies to actions of account between partners. *Todd v. Rafferty's Adm'r*, 476.

LIMITATIONS, STATUTE OF.

16. Where such accounts have been closed for six years, and there has been acquiescence for that period, without fraud, the statute constitutes a bar; *aliter* where there have been dealings within the six years. *Todd v. Rafferty's Adm'r*, 476.

17. The statute does not run against each item from its date, but if part be within the period it draws the others after it. *Id.*

18. In cases of fraud, the statute runs from the time of discovery. *Id.*

19. Defence under, is a vested right, that cannot be impaired by subsequent legislation. *Ryder v. Wilson's Ex'rs*, 588.

20. In the administration of a decedent's estate, the expiration of the time for the creditors to present their claims, worked, under the old law, a bar. *Held*, that the repeal of the law authorizing this procedure, did not revive the right to enforce such claims. *Id.*

21. The rule and the fact that the claim sued on was not presented within the time limited, may be pleaded as a bar. *Id.*

22. In debt on judgment of a court of another state, defendant gave notice of reliance on the Statute of Limitations, and on the fact that during more than eight years he had resided in this state and had known attachable property therein. *Held*, that the allegation as to residence and the possession of property was surplusage, and that the burden was on plaintiff to show that the statute had not run. *Cupen v. Woodrow*, 791.

LOST PROPERTY.

1. The finder of lost property has title as against any one, except the loser or real owner, and the fact that it was found by an employee among property purchased by his employer, makes no difference. *Bowen v. Sullivan*, 686.

2. Rights of finder of lost property, discussed. *Id. Note.*

LUNATIC. See INSANITY.

MALICIOUS PROSECUTION.

1. Plaintiff must show legal termination of the prosecution, and malice or want of probable cause. *Potter v. Casterline*, 588.

2. The legal termination is sufficiently shown by the refusal of the grand jury to find a bill. *Id.*

3. A rejection of the complaint by the grand jury is *prima facie* evidence of want of probable cause. *Id.*

4. A nonsuit should be refused, if, from the evidence, the jury might infer that the defendant had no belief or suspicion of plaintiff's guilt. *Id.*

5. Defendant cannot excuse himself by showing that he acted under the advice of an unprofessional person. *Id.*

MANDAMUS. See MUNICIPAL BONDS, 4; PUBLIC SCHOOLS, 3.

1. The limitations of the Ohio code of civil procedure, as to the time of commencing civil actions, do not apply to proceedings in mandamus. *Chinn v. Trustees*, 203.

2. Where, however, the relator has for an unreasonable time slept upon his rights, the court may refuse to issue the writ. *Id.*

3. In determining what constitutes such unreasonable delay, regard may be had to the circumstances, to the character of the case, and whether any rights have been prejudiced by the delay. *Id.*

4. Payment of a judgment against a city may be enforced by mandamus at the suit of an assignee of the judgment. *City v. Sansom*, 333.

5. Cannot be used to perform the office of an appeal or writ of error. *Ex parte Schwab*, 397.

6. Where application is made for an injunction, the court must determine whether that power can be exercised, and if they decide wrongly, the remedy is by appeal and not by mandamus. *Id.*

7. To compel payment to a contractor from a special assessment, denied where the assessment had been adjudged invalid in a suit brought by a taxpayer. *People v. East Saginaw*, 451.

8. Will not lie to compel a court to proceed with a trial that has been enjoined. *People v. Circuit Judge*, 459.

MARITIME LIEN. See ADMIRALTY, III.

MARRIAGE. See ACTION, 7; HUSBAND AND WIFE, I.

MASTER AND SERVANT. See FRAUDS, STATUTE OF, 13; LOST PROPERTY, 1; RAILROAD, 1.

1. Where a mining company let a contract for taking out ore, but employed persons to watch for dangerous rocks, and in other ways retained control over the mode of mining, and a servant of the contractors was killed by a falling rock, the danger from which ought to have been detected. *Held*, that the mining company was responsible. *Lake Superior Iron Co. v. Erickson*, 28.

2. It is not contributory negligence for a servant to go into a dangerous place in deference to the opinion of others, who, by their positions are bound to have better knowledge as to the danger. *Id.*

3. Liability of landowner for injuries to persons upon his premises, discussed. *Id. Note.*

4. If an employee under contract to serve for a fixed period leaves the service before the expiration thereof, he is not entitled to recover what may be due after deducting damages for the breach of contract. *Powers v. Wilson*, 264.

5. A servant, for reward, takes upon himself the natural risks and perils incident to his employment. But where there are latent risks which are known to the master it is his duty to notify the servant. If unknown to the master through no negligence of his, the risk is with the servant. *Steffen v. The Railway Co.*, 435.

6. A switchman was injured in consequence of a worn rail left on a side-track by his fellow employees. He had full means of knowing the condition of the track, and the custom of using worn rails for side-tracks. *Held*, that he could not recover. *Michigan Central Railroad v. Austin*, 524.

7. One voluntarily entering a dangerous service, knowing the danger, assumes the risk of his employment. *Kelly v. Silver Spring Mine Co.*, 732.

8. An employee continuing to work exposed to a known danger, without complaint, without any promise that the danger shall be removed, and not under stress of special exigency, consents to the risk. *Id.*

9. An employee is only entitled to have the best practical appliances used having in view the business of the employer. *Baldwin v. Railroad*, 761.

10. It is not negligence for a railroad company to transport for connecting roads cars differently constructed from its own, but in ordinary use on the connecting roads. *Id.*

11. Liability of master for injuries to servant by instrumentality employed in the business. *Id. Note.*

MECHANIC'S LIEN.

An agreement to take second mortgages in payment is a waiver of the right to file a mechanic's lien. *Weaver v. Demuth*, 131.

MERGER.

Where it is the right and for the interest of a creditor to preserve a mortgage title intact, equity will not infer an intent to merge it. *Del. & Hud. Canal Co. v. Bonnell*, 419.

MINES AND MINING. See MASTER AND SERVANT, 1.

1. The ninth section of the Act of Congress of July 26th 1866, "granting the right of way to ditch and canal owners over the public lands," only confirms to such owners the rights which they held under the local customs, laws and decisions, and confers no additional rights upon owners of ditches subsequently constructed. *Jennison, Ex'r, v. Kirk*, 660.

2. The origin and character of the customary law of miners explained. *Id.*

3. By that law the owner of a mining claim and the owner of a water-right in California hold their respective properties from the dates of their appropriation, but where both rights can be enjoyed without interference, they are both allowed. *Id.*

4. By that law a person cannot construct a ditch to convey water across the mining claim of another, taken up and worked before the right of way was acquired. *Id.*

MINES AND MINING.

5. The local record of a mining community is not the best or only evidence of priority or extent of possession. *Campbell v. Rankin*, 664.

6. The Act of Congress of May 10th 1872, section 5, gives no greater effect to the record of such mining claims than is given to the registration laws of the states. *Id.*

MISTAKE. See EQUIT, 1-5, 8, 9, 23, 36; EVIDENCE, 19; MORTGAGE, 11.

1. When a party, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect, this is a *mistake of law*, and not of fact. *Birkhauser v. Schmitt*, 131.

2. Upon a sale of milk, if there is a mistake of the parties as to the amount held by each can, and the vendor receives more than he is entitled to, he must account even though the purchaser was negligent in discovering the mistake. *Devine v. Edwards*, 269.

3. Where through mutual mistake a lot of land was conveyed instead of an adjoining one, relief can only be granted by transferring to such adjoining lot the encumbrances put on the former. *Weston v. Wilson*, 789.

MORTGAGE. See ATTORNEY, 4; COLLATERAL SECURITY, 1; DEBTOR AND CREDITOR, 1, 19; EJECTMENT, 1; ESTOPPEL, 2; FORMER ADJUDICATION, 4; FRAUD, 3, 7; HOMESTEAD, 1; HUSBAND AND WIFE, 11; INSURANCE, 5, 15; LANDLORD AND TENANT, 1, 5; MERGER, 1; NATIONAL BANK, 1, 6; POSSESSION, 3; RAILROAD, 13; RECEIVER, 9; TENDER, 1; UNITED STATES COURTS, 1.

I. Of Chattels.

1. An unrecorded chattel-mortgage not valid as against a mortgage subsequently executed and recorded. *Pitkin v. Fletcher*, 60.

2. The mortgagee of chattels has the legal title even before the debt is due, and may take immediate possession. *Appleton Iron Co. v. Ins. Co.*, 316, and *Note*.

3. A mortgage upon logs in the drive is void for uncertainty against third persons, if it does not furnish the data for separating the mortgaged logs from the mass. *Richardson v. Alpena Lumber Co.*, 389.

4. A chattel-mortgage in form for an absolute debt, but really to secure against a contingent liability as surety, is not fraudulent as to creditors of the mortgagor, and the mortgagee may hold it for debts which he has not yet paid but which, as surety, he will have to pay. *Goodheart v. Johnson*, 519.

5. In Rhode Island a mortgage of personal property to be subsequently acquired, creates in equity a valid lien on such property when acquired. *Williams v. Winsor*, 661.

II. Of Realty.

6. The right of redemption, after sale on foreclosure, in Illinois, as decided in *Brine v. Insurance Co.*, 6 Otto, re-affirmed. *Orvis v. Powell*, 60.

7. Where a mortgagee holds adverse possession for twenty-one years under a decree of foreclosure, the equity of redemption is barred although the decree be void. *Clarke v. Potter*, 62.

8. An agreement by a purchaser of lands, sold under a deed of trust, to give the owner a right to redeem, cannot be enforced against an innocent grantee of the purchaser, who has given negotiable notes for part of the purchase-money. *Aliter*, if, at the time of trial, the notes remain in the hands of the first purchaser. *Digby v. Jones*, 132.

9. A renewal mortgage for the same debt takes precedence of one recorded subsequent to the original mortgage and prior to the renewal. *Shaner v. Williams*, 132.

10. Extension of time of paying interest on mortgage made after the mortgagee had ratified several similar extensions made by his agent, is a waiver of a provision that the principal should become due on default in the interest, and a suit at law for the principal would be enjoined. *Bell v. Romaine*, 202.

11. A mortgagee cannot avail himself of an assumption of a mortgage inserted in a deed by a mistake of the scrivener, without the knowledge of the parties to the deed. *Stevens Institute v. Sheridan*, 203.

MORTGAGE.

12. Where the grantee of a mortgagor conveys the mortgaged premises in different parcels, and the grantees of such parcels again convey them in parcels—*Held*, that the grantees of the latter parcels are liable to pay their share of the mortgage-debt, in the inverse order of conveyance to them. *Hiles v. Coult*, 203.

13. A mortgage for want of words of inheritance conveyed only an estate for life, although intended to convey the fee. A second mortgagee had such notice as induced the belief that the first mortgage was in fee. *Held*, that as against him the first mortgage should be regarded as in fee. *Gale v. Morris*, 265.

14. May be foreclosed for interest overdue, although principal is not due. *Butler v. Blackman*, 459.

15. A mortgage for a balance of purchase-money has priority of one given by the vendee to a person who furnishes him the money to make the cash payments, notwithstanding the latter is recorded first. *Turk v. Funk*, 459.

16. A mortgagor cannot commit waste; and the removal of a house may be enjoined, or if it has been severed, the mortgagee may maintain replevin. *Dorr v. Dudderar*, 588.

17. If a mortgage proves defective, by reason of some informality or omission, it will be enforced by a court of equity, not only as against the mortgagor, but as against subsequent judgment-creditors. *Dyson v. Simmons*, 588.

18. A conveyance made as security for a loan, whatever its form, will be treated by equity as a mortgage, and parol evidence is admissible to show its character. *Butler v. Butler*, 661.

19. A vendee, under a deed which recites that he assumes payment of certain mortgages made by his vendor, is liable in assumpsit to the mortgagees for the amount of the mortgage-notes, and this contract being an implied one, is not within the Statute of Frauds. *Urquhart v. Brayton*, 726.

20. A recital in an administrator's deed that the purchaser had complied with a decree requiring a mortgage to be given, is sufficient notice to the purchaser's vendee of the existence of the mortgage, though the latter be unrecorded. *Aetna Life Ins. Co. v. Ford*, 731.

21. A bill to foreclose a mortgage, should be brought in the name of the equitable owner of the notes, but the objection that it is brought in the payee's name should be made in the court below. *Irish v. Sharp*, 731.

MUNICIPAL BONDS. See MUNICIPAL CORPORATION, 17, 20; TAXATION, 16.

1. Municipal bonds on their face referred to the ordinance authorizing their issue and which was printed on the back. The ordinance recited that an election required by law had been duly held. In an action by an innocent holder. *Held*, that the court properly sustained a demurrer to pleas, which merely tendered issue as to the authority to issue the bonds and as to the validity of the election. *City of Nauvoo v. Ritter*, 61.

2. One who takes county bonds issued under a statute which limits the rate of taxation for their payment, is chargeable with knowledge of the limitation. *State v. Macon County Court*, 459.

3. Indebtedness on bonds issued to pay a railroad subscription, is not one of the "expenses of the county," within the meaning of Wag. Stat., sect. 166, 1193. *Id.*

4. Payment of such indebtedness not enforced by mandamus, where such action would withdraw funds necessary to the support of the county. *Id.*

5. Where the county court has refused to draw a warrant therefor, it will not be compelled by mandamus to change its decision. 1. Because its action is judicial; and, 2. Because an appeal lies to the Circuit Court. *Id.*

6. United States ex rel. v. Clark County Court, 96 U. S. Rep. 211, disapproved. *Id.*

MUNICIPAL CORPORATION. See CONSTITUTIONAL LAW, 10, 33; DAMAGES, 6; HIGHWAY, 1-6; MANDAMUS, 4; MUNICIPAL BONDS; OFFICE AND OFFICER, 3; STATUTE, 2, 15; TAXATION, 16.

1. An invalid organization of a county is validated by a subsequent legis-

MUNICIPAL CORPORATION.

lative recognition of the existence of the county. *State of Kansas v. Stevens*, 43, and *Note*.

2. Municipal corporation not dissolved by non-user. *Id.*

3. The charter of a borough authorized the warden and burgesses to remove encroachments upon the highway. The warden, by direction of a vote of the warden and burgesses, removed a fence supposed by them to be an encroachment, but which in fact was not. In an action of trespass by the owner: *Held*, 1. That the grant of power, though to the warden and burgesses, was in reality to the borough. 2 That it was exercised by the borough for its own advantage, and not as a governmental duty. 3. That the borough was liable for the acts of the warden. *Weed v. Borough of Greenwich*, 204.

4. City authorities after notice allowed a sidewalk to remain dilapidated and out of repair, whereby a person received an irreparable injury: *Held*, that the right of recovery against the city was clear. *City v. Herz*, 383.

5. Courts will not interfere with a fair and honest exercise of discretion by municipal authorities in levying a tax beyond the sum required for its debts in order to meet expenses of collection and probable deficiencies. *Village v. Ingalls*, 334.

6. Powers delegated to municipal corporations will always be strictly construed with reference to the intention of the grant. *Henderson v. City of Corington*, 385.

7. A city cannot appropriate its revenues except to the discharge of some legal duty, or to accomplish some of the objects of its creation. *Id.*

8. A city cannot appropriate money to pay the expenses of persons to visit the state capital and procure legislation. *Id.*

9. A city received money for legitimate purposes, and issued therefor bank bills, a form of indebtedness prohibited by the state statutes, but afterwards cancelled these bank bills and delivered in lieu thereof bonds: *Held*, that this new form of obligation was valid. *City of Little Rock v. Merchants' National Bank*, 390.

10. A city may temporarily discontinue the use of a street as a highway for the purpose of constructing a sewer, and the easement of a street railway company is subject to such right. *Kirby v. Citizens' Railway Co.*, 460.

11. Where the sewer could not be constructed without interfering with the railway track, the injury resulting from such interference was *damnum absque injuria*. *Id.*

12. A city authorized to erect, repair and regulate public wharves, and fix the rate of wharfage, cannot lease its wharf, or farm out its revenues, or empower any one else to fix the rates of wharfage. *Matthews v. City of Alexandria*, 460.

13. The owner of a lot on an unimproved street in erecting buildings assumes the risk of damage from the subsequent grading of the street. *City of Akron v. Chamberlain Co.*, 460.

14. The municipality is liable only where such buildings were erected with reference to a grade actually established, or where the grade subsequently established is unreasonable. *Id.*

15. Whether a grade be unreasonable must be determined by the circumstances existing at the time the grade was established. *Id.*

16. The municipality is liable where a lot is improved with reference to a reasonable future grade which is afterward established, and damage results from a subsequent change in the grade. *Id.*

17. Power of a city to borrow money and issue securities depends upon its charter and the legislation applicable to it. *Gause v. City*, 497.

18. Such power is not inherent or incidental to the usual grants of municipal power. It may be inferred from powers requiring extraordinary expenditures usually met by borrowing, and where this appears to have been the legislative intent. *Id.*

19. These principles applied to the borrowing of money to repair wharves and open streets, and to the borrowing of money to pay for stock in companies under a special statute. *Id.*

20. Where bonds are issued without authority for money actually received, the remedy is by action, not on the bonds, but to recover the money. *Id.*

MUNICIPAL CORPORATION.

21. The legislature may, for police purposes, prescribe the limits of municipal bodies, and give them power to pass ordinances to prevent nuisances to operate beyond their boundaries. *Chicago Packing and Provision Co. v. Chicago*, 589.

22. The legislature can authorize benefits to be assessed upon property adjacent to, as well as within a city. *Brooks v. Mayor of Baltimore*, 589.

23. Such assessment is not a tax for the support of the municipal government, but a contribution from persons whose property has been increased in value by the improvement to an amount equal to the assessment. *Id.*

24. A municipal corporation will not be allowed to purchase realty in order to compel a taxpayer to abandon litigation with the municipality. *Place v. City of Providence*, 731.

25. A city ordinance is not conclusive, but may be shown to be unnecessary and oppressive. *Carrigan v. Gage*, 731.

26. A writ of *fiery facias* may issue in West Virginia, against a political public municipal corporation. *Brown v. Gates*, 731.

27. But by implication the taxes and public revenues of such corporations are exempt. *Id.*

28. *Semble*, that such corporation may own property strictly private, which is subject to levy under a *fiery facias*. But property owned for public purposes is not subject to such levy. *Id.*

29. The fee of the soil of the streets of Chicago is in either the state or city, and the city may, under legislative authority, construct a tunnel therein without being liable to lot-owners for damages. *City of Chicago v. Rumsey*, 135.

30. The right of a corporation to condemn property for the construction of a horse or dummy railway in the streets of a city is derived solely from the state law, and the consent of the city is not a condition precedent; such consent can be obtained after condemnation, and if given, is a mere license, revocable at any time before it is acted on. *Metropolitan City Railway Co. v. Chicago W. D. Railway Co.*, 135.

31. A municipal corporation may appropriate an easement in land abutting on a street for the purpose of affording lateral support to the street. *Dodson v. The City of Cincinnati*, 391.

32. Such appropriation does not divest the owner of his dominion over the servient property for all purposes not inconsistent with the support to the street. *Id.*

33. Not liable for the acts of its officers unless such acts were authorized or ratified. *Donnelly v. Tripp*, 661.

MURDER. See CRIMINAL LAW, VII.**NAME.** See CRIMINAL LAW, 8; PARTNERSHIP, 25; TRADEMARK, 4; WILL, 1.

A contract is binding when signed by the party making it, though he may use an English translation of a French name, as *Seam* for *Couture*, in his signature thereto. *Augur v. Couture*, 61.

NATIONAL BANK.

1. A national bank cannot loan money on real estate security, and a mortgage given to one of its officers to secure re-payment of a loan by the bank is void. *Findley v. Bowen*, 204.

2. Where a national bank makes to one of its directors a loan, which in amount and rate of interest is in contravention of the National Banking Act, the borrower is not estopped to defend against a recovery of interest. *Bank of Cadiz v. Stemmans*, 389.

3. If a payee when he receives the note surrender the maker's note of an earlier date, the facts, and not what the payee called the transaction, will determine whether it was a renewal or payment. *Id.*

4. In rendering judgment on a renewal-note given to a national bank, which note included illegal interest on the original note, the whole interest on both notes will be disallowed. *Id.*

5. Payments made generally on such note will be applied to the principal. *Id.*

NATIONAL BANK.

6. Unless the title by mortgage or conveyance is taken to the bank directly, for its use, the case is not within the prohibition of the statute. *Union National Bank et al. v. Matthews*, 461.

7. Where a corporation is incompetent to take title to real estate, a conveyance to it is only voidable, and is valid until assailed in a direct proceeding. *Id.*

NATURALIZATION.

CITIZENSHIP BY NATURALIZATION, 593, 665.

NAVIGABLE STREAM. See NEGLIGENCE, 7; RIPARIAN RIGHTS, 1.

NEGLIGENCE. See ACTION, 4, 5; ADMIRALTY, 4; CHECK, 2; EVIDENCE, 8, 26, 38; HIGHWAY, 1, 3, 5; INNKEEPER, 1; MASTER AND SERVANT, 1-5, 6, 7, 9-11; MUNICIPAL CORPORATION, 4; RAILROAD, 2, 5, 19, 25.

1. The omission by a person in full possession of the faculties of seeing and hearing, to use such faculties for the avoidance of danger in crossing a railroad, is negligence, and will defeat an action for an injury to which it contributed. *Pennsylvania Co., &c., v. Rathgeb*, 61.

2. The question of negligence or of contributory negligence, generally a mixed question of law and fact, to be decided by the jury, under proper instructions. *Id.*

3. But if all the material facts be undisputed, or be found by the jury, and admit of no rational inference but that of negligence, the question becomes one of law merely. *Id.*

4. In an action for the loss of a cow killed by a train, plaintiff was held as matter of law guilty of contributory negligence in turning his cow loose upon premises nearly surrounded by railroads, one of which she was accustomed to cross in going to water. *McCundless v. Railroad Co.*, 133.

5. The facts that the track was unfenced, and that the train was running somewhat faster than usual at that place, and was not slackened, nor any alarm given, would not have sustained a verdict that the defendant was guilty of any wilful or malicious act. *Id.*

6. There was no error in rejecting evidence offered by plaintiff, that other cattle were in the habit of running at large in that vicinity. *Id.*

7. Where a bridge over a navigable stream is authorized by Act of Congress, the builders may cause such obstruction of the stream as is reasonable and necessary to the construction of the work, and the rights of navigation are limited by these rights. *Railroad Co. v. Transportation Co.*, 204.

8. Leaving a barge unguarded in a navigable part of the river is not negligence if justified by the necessities or convenience of the bridge builders. *Id.*

9. And if such vessel is moored out of the usual path of vessels, and in a place where work is going on from day to day, the absence of a light is not necessarily negligence. *Id.*

10. Damages cannot be recovered unless the alleged negligence was the proximate cause of the injury. *Id.*

11. A pilot leaving the usual channel of navigation must exercise an increased amount of care. *Id.*

12. An absence of a lookout on a steamer approaching at night a place of danger is such negligence as will prevent recovery, unless it clearly appears that such lookout would not have prevented disaster. *Id.*

13. Although the proximity of the cause to the injury is generally for the jury to determine, yet where it is obvious from undisputed facts that there was an intervening agency the court should take the case from the jury. *Hoag v. Railroad Co.*, 214.

14. By reason of a landslide an oil train was wrecked. The oil took fire, floated down an adjacent stream and destroyed plaintiff's buildings: Held, that even if the engineer were negligent the loss was not such natural consequence as ought to have been foreseen by him. Held further, that the facts being undisputed, the evidence was properly not submitted to the jury. *Id.*

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15. *Penna. Railroad v. Hope*, 80 Penn. St. 373, distinguished; *Penna. Railroad v. Kerr*, 62 Id. 353, followed. *Hoag v. Railroad Co.*, 214.

16. Doctrine of proximate or remote cause in reference to liability for damages, discussed. *Id.*, Note.

17. Plaintiff carelessly walked upon the track of a railroad only a few steps south of an approaching train, without looking north, paid so little heed as not to hear the bell or whistle, or notice the calls of persons, and was run over by the engine, not moving at high speed. There was no proof of wanton or wilful injury: *Held*, that the plaintiff's negligence was so gross as to preclude a recovery. *Railroad Co. v. Hart*, 335.

18. Where an intent, either actual or constructive, to commit an injury exists, such injury ceases to be a merely negligent act, and becomes one of violence. *Penna. Railroad v. Sinclair*, 378.

19. Contributory negligence is a complete defence to an action for a merely negligent injury. *Id.*

20. One who brings an action for an injury by defendant's negligence, has the burden of proving such negligence. *Steffen v. Railroad Co.*, 397.

21. In such action, where, upon plaintiff's evidence, the accident appeared unaccountable, and defendant's evidence, so far as it accounted therefor, showed that it arose from an *occult risk incident to the employment*, or that, if there was negligence, it was that of the plaintiff, it was error to submit the question of negligence to the jury. *Id.*

22. The nature of the injury may in some cases raise a presumption of negligence. *Steffen v. Railroad Co.*, 435.

23. The owner of animals not naturally inclined to commit mischief, is not liable for an injury committed by them unless it be shown that he had notice of the animal's mischievous propensity, or that there was some neglect on his part. *Marean v. Vanatta*, 517.

24. Animals *feræ naturæ* are known to be mischievous; and whoever keeps such an animal in places of public resort is liable for injuries committed by it. *Congress Spring Co. v. Edgar*, 613.

25. Whoever keeps a dangerous animal, with knowledge of its dangerous propensities, is liable to one injured thereby, without proof of negligence in the securing or taking care of the animal. *Id.*

26. Plaintiff was injured by a buck while in a park owned by defendants and open to the public. The buck was at large; there was no evidence that it had attacked others, but defendants had posted a notice, "Beware of the buck." There was expert evidence that bucks were dangerous at the season the injury was received: *Held*, that defendants were liable. *Id.*

27. Liability of owner for injury inflicted by wild animals, discussed. *Id.* Note.

28. Plaintiff's goods were injured while in possession of defendant as a bailee for hire, and defendant, when applied to, gave no satisfactory account of the injury: *Held*, that the jury might infer negligence. *Kirst v. Railroad Co.*, 661.

29. A company supplying gas being in charge of a dangerous material, must exercise due care to prevent careless interference with its pipes by others, and whether they have done so is a question for the jury. *Butcher v. Providence Gas Co.*, 732.

NEGOTIABLE SECURITIES. See BILLS AND NOTES; MUNICIPAL BONDS, 1, 2.

NEW TRIAL. See CRIMINAL LAW, 21, 41, 42; ERRORS AND APPEALS, 5, 8; JUROR AND JURY, 1; VERDICT, 3.

1. Where a plaintiff brings a case on for trial in the absence of the defendant, in violation of a written stipulation, a court of equity will grant a new trial, and this though relief may be had at law. *Foote v. Despain*, 269.

2. After a new trial has been denied, a second motion upon the same grounds cannot properly be granted. *Rogers v. Hoenig*, 397.

3. No one but a party to the suit can ask for a new trial. *Id.*

4. The mere fact that a juror in a civil case drank intoxicating liquor dur-

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ing an adjournment while the trial was in progress, is not a sufficient reason for granting a new trial. *Pittsburgh, Cin. & St. Louis Railway Co. v. Porter*, 527.

5. Where the liquor was furnished by the prevailing party, the new trial will be granted, unless it clearly appears that this action was not intended to influence, and did not influence, the juror. *Id.*

6. An attempt to corrupt a juror, though not successful, is good ground for a new trial. *Id.*

7. Will be granted when it appears that the jury must have omitted to take into consideration some of the elements of damage properly involved in the plaintiff's claim. *Phillips v. Railway Co.*, 732.

NONSUIT. See UNITED STATES COURTS, 15.

NOTICE. See GUARANTY, 8; INSURANCE, 13; MORTGAGE, 13, 20; POSSESSION, 3, 5.

NUISANCE. See CRIMINAL LAW, VIII.; MUNICIPAL CORPORATION, 21.

1. The purchaser of a property used for a particular purpose, is bound to know at his peril that at some time such use may, by the residence of many people in the vicinity, become a nuisance, and that it must yield to regulations for the suppression of nuisances. *Northwestern Fertilizing Co. v. Village of Hyde Park*, 62.

2. In such case prescription, whatever the length of time, has no application. *Id.*

3. Courts of equity may enjoin a business before the fact of its being a nuisance is established at law, where there is danger of immediate irreparable loss or material injury. *Minke v. Hopeman*, 133.

4. That which the law authorizes cannot be a nuisance so as to give a common-law right of action. *Northern Trans. Co. v. Chicago*, 589.

5. If a statute which authorizes acts harmful to individuals be such as the legislature has power to pass, the acts are lawful and are not nuisances. *Id.*

6. In such grants of power, a right to compensation for consequential injuries may be given, but such right is a creature of the statute. *Id.*

7. In equity proceedings to obtain relief for the inundation of complainant's land, and of his private road to a highway by the building of defendant's dam: *Held*, that under the circumstances of the case the dam was a nuisance in law but not in fact. *Held further*, that relief should be granted for the inundation of the land. *Held further*, that it appearing that the raising of the grade of the private road would give access to a new and more convenient highway, the interruption to this road was capable of pecuniary compensation, and therefore remediable at law. *Stone v. Peckham*, 662.

8. The erection by a landowner of a building overtopping his neighbor's chimneys and causing them to smoke, is not a nuisance which will give the neighbor a right of action. *Bryant v. Lefevre*, 780.

OFFICE AND OFFICER. See AGENT, 1; BILLS AND NOTES, 1; CHECK, 1, 2; EVIDENCE, 2; EXECUTION, 1, 5; MUNICIPAL CORPORATION, 33; REWARD, 3; SLANDER, 1; SURETY, 1, 2; UNITED STATES, 1.

1. The legislature may repeal a statute under which an officer has been appointed, and the office expires with the repeal. *State ex rel. Birdsey v. Baldwin*, 205.

2. A person is not entitled to the salary of a public office, unless he both obtains and exercises the office. *Farrell v. City*, 334.

3. A policeman of a city is a public officer, holding his office as a trust and not as a matter of contract. *Id.*

4. Officers having quasi judicial powers, not liable for injuries resulting from acts done understandingly and in good faith within the limits of their authority. *Van Dusen v. Newcomer*, 395.

5. A legally-elected officer, duly qualified, is entitled to the salary, even though debarred from his duties by an intruder. *Comstock v. City of Grand Rapids*, 398.

6. The law presumes that persons acting in a public office have been duly

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appointed, and are acting with authority, until the contrary is shown. *Keely v. Sanders*, 525.

7. An officer *de facto* is not a mere usurper, nor yet within the sanction of law, but one who, *colore officii*, claims and assumes to exercise official authority, is reputed to have it, and the community acquiesces accordingly. *Hussey v. Smith*, 525.

8. The acts of such officers are held to be valid, because the public good requires it. *Id.*

9. An officer sued for exceeding his authority is not to be presumed to have been justified by extraordinary circumstances. *Stilson v. Gibbs*, 589.

10. Where an officer, by abuse of his authority, renders himself technically liable as a trespasser *ab initio*, the jury may nevertheless limit the damages to the plaintiff's actual injury. *Id.*

11. A pledge by a candidate for a public office that he will perform his duties for one-half the legal fees, is contrary to public policy, and the title to an office obtained thereby is invalid. *State v. Collier*, 768.

ORDINANCE. See MUNICIPAL CORPORATION, 25; STATUTE, 2, 15.

PARDON. See CRIMINAL LAW, 27.

PARENT AND CHILD. See AGENT, 2; SPECIFIC PERFORMANCE, 13, 14; TRUST AND TRUSTEE, 13.

A father who has supplied, or is ready to supply, his minor son with necessities, cannot be bound by a contract of the son for necessities. *Johnson v. Smallwood*, 525.

PARTIES. See ACCOUNT, 3; EQUITY, 13, 28; MORTGAGE, 21; PROHIBITION, 1.

PARTITION. See HUSBAND AND WIFE, 9.

PARTNERSHIP. See BANKRUPTCY, 15; EQUITY, 5, 7; JOINT DEBTORS, 1; LIMITATIONS, STATUTE OF, 2, 15.

1. The occupancy and cultivation by one of the farm of another, under an agreement that the crops raised shall be divided between them in a certain proportion, does not constitute them co-partners. *Donnell v. Harshe*, 62.

2. In a case free from fraud, a conveyance of firm assets by one partner in payment of his individual debt, if made with the consent of his co-partners, is valid as against firm creditors. *Schmidlapp v. Currie*, 108.

3. Acceptance by creditor of the note of one partner, after dissolution of firm, in lieu of a matured firm note, not an extinguishment of the firm debt. *Leabo v. Goode*, 133.

4. In such case, a surety on the note of the individual partner may recover from the other partners money which he has paid in discharge of the note. *Id.*

5. If property seized by the tort of one partner is appropriated to the use of the firm, the other partners are liable. *Durant v. Rogers*, 134.

6. Statement of account between partners conclusive, except in cases of mistake, accident, fraud or undue advantage. *Gage v. Parmelee*, 134.

7. A dormant partner need not give notice of his retirement from the firm to strangers having no knowledge of his connection with it. *Nussbaumer v. Becker*, 205.

8. Where a partner borrows money on his individual note, such borrowing does not create a partnership debt, though the money be applied to partnership purposes; and the principal of a surety on such note is the individual partner, and not the partners generally. *Peterson v. Roach*, 205.

9. If a bank pays out firm money to one partner upon his check, in fraud of the rights of the other partners, an action at law cannot be maintained in the firm name, but a resort must be had to equity. *Church v. First Nat. Bank*, 269.

10. An assignment by two partners of all their property for the payment of their debts conveys their separate property, although their names in the assignment are immediately followed by the word "partners." *Williams v. Hadley*, 334.

11. Property purchased by one co-partner with the funds of the firm, the

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title being taken in the name of his wife, is partnership assets. *Partridge v. Wells*, 334.

12. As against the creditor, a partnership debt is not extinguished by the fact that one partner, after dissolution gave, without authority, a note in the firm name for the debt, the creditor believing the note to be binding. *Gardner v. Conn*, 398.

13. As between the partners themselves, such transaction will not discharge the non-consenting partner from liability to make contribution. *Id.*

14. Partner not bound by accommodation endorsement made in the name of his firm without his assent. *Heffron v. Hanaford*, 461.

15. A partner's declarations cannot bind his associates in concerns foreign to the partnership, nor can his admissions bring such matters within the scope of the business. *Id.*

16. A note was given by a debtor to an execution-creditor to obtain a release from a levy, and was endorsed in the name of a firm by one of the partners. *Held*, that it must be presumed that it was an accommodation endorsement, and that the creditor was privy to the facts. *Id.*

17. Profits made secretly by one partner in the business of the firm, are partnership property. *Todd v. Rafferty's Adm'r*, 476.

18. A firm is dissolved by the death of a partner. *Jenness v. Carleton*, 590.

19. A surviving partner cannot bind co-survivors by signing the firm name without their authority. *Id.*

20. As long as firm debts are outstanding, it is irregular to distribute any assets among the partners. *Hull, Adm'r v. Clagett*, 590.

21. It is the duty of each partner to aid in the settlement of the firm business even after final dissolution. *Id.*

22. The powers of partners are co-ordinate whether the partnership be in active operation or subsisting only for the purpose of winding up its affairs, and each partner should keep for inspection precise accounts of his transactions for the firm. *Id.*

23. A total failure to do this, without excuse, affords a good reason for a court of equity to refuse to supply such accounts. *Id.*

24. A court of equity will not adjust the relative rights of partners when the proof is utterly deficient and inconclusive. *Id.*

25. If the firm name be merely the name of one partner, the firm is not liable on a bill of exchange signed with such name without proof that it was made with the authority of, and for the purposes of the firm. *Yorkshire Banking Co. v. Beatson*, 733.

PASSENGER. See COMMON CARRIER, 2; RAILROAD, 5, 25.

PATENT. See TRADEMARK, 1; UNITED STATES COURTS, 14.

1. A re-issued patent must be for the same invention as the original, or for a part thereof, when divisional re-issues are granted. *Giant Powder Co. v. California Powder Works*, 269.

2. An original patent for a process will not support a re-issued patent for a composition, unless the invention of the one involves the invention of the other. *Id.*

3. A patent for processes of exploding nitro-glycerine will not support a re-issue for a composition of nitro-glycerine and gunpowder, even though the original application claimed the invention of both process and compound. *Id.*

PAYMENT. See ACTION, 8; AGENT, 4; ASSUMPSIT, 2; MISTAKE, 2.

1. A debtor delivered a horse to his creditor to sell and apply the proceeds to the debt. The creditor exchanged the horse for other property, and the amount to be applied was disputed. *Held*, that the transaction amounted to a payment, instead of a mere basis of set-off. *Strong v. Kennedy*, 398.

2. When voluntary cannot be recovered back, though the demand was illegal and a written protest filed. *Union Pacific Railroad Co., v. County Com., &c.*, 525.

3. When a party is called upon to pay an illegal tax, and can save himself and his property in no other way than by paying it, he may protest and recover it back. *Id.*

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4. Where, however, before any steps are taken to enforce the tax, he pays in the usual course of business at the tax office everything that is charged against him, accompanying the payment with a general protest, such payment is not compulsory. *Union Pacific Railroad Co. v. County Com., &c.*, 525.

PENSION. See **LIMITATIONS, STATUTE OF**, 8.

PLEADING. See **ACCOUNT**, 5; **CRIMINAL LAW**, 15, 16, 26, 31, 34; **ERRORS AND APPEALS**, 3; **LIMITATIONS, STATUTE OF**, 22.

1. A plea which answers only part of a count, is good if that part is severable from the rest as a basis of recovery. *Fleming v. Mayor of Hoboken*, 134.

2. A plaintiff declaring specially upon an express contract between third persons, must aver his title, and then make out by evidence the contract and his title as alleged. *Rose v. Jackson*, 590.

3. The right to sue as assignee of a contract must be positively averred. An averment of the assignment in the common counts will not support a recovery upon the special count in which it is not averred. Nor will a mere allusion to it in the special count be sufficient. *Id.*

POSSESSION. See **DEBTOR AND CREDITOR**, 1, 5, 22; **FRAUDULENT CONVEYANCES**, 1; **HUSBAND AND WIFE**, 37; **LIMITATIONS, STATUTE OF**, 1; **MINES AND MINING**, 5; **SPECIFIC PERFORMANCE**, 17; **VENDOR AND PURCHASER**, 5, 9.

1. One who enters upon land under color of title, intending to take possession of the entire tract, no part of which is held adversely at the time of his entry, is deemed to be in possession to the extent of his claim. *Clark v. Potter*, 62.

2. The principle that possession of land is notice of title, is intended to protect equitable rights, and not to cover the possessor's fraud. *Groton Saving Bank v. Batty*, 205.

3. As against an innocent mortgagee, notice from possession cannot be set up by an occupant who being insolvent put the title in the name of the mortgagor and who becoming aware of the mortgage, remained silent, and permitted the mortgagor to obtain a second loan on mortgage from the same mortgagee. *Id.*

4. A person in actual possession of real estate under an unrecorded deed, is, as against all persons having notice of the deed, the legal, and as against all other persons the equitable owner. *Tucker v. Vandermark*, 334.

5. Persons are bound to take notice of the equitable interest of a person in actual possession. *Id.*

6. If one takes possession of the land of another, believing and claiming it to be his own, his possession is adverse. *Walbrunn v. Ballen*, 591.

7. A proposal from one in possession to buy out the holder of the true title, does not necessarily amount to an acknowledgment that the possession is not adverse. *Id.*

8. In ejectment or trespass, actual possession or receipt of rent is *prima facie* evidence of title, as against a naked trespasser. *Burt v. Panjaud*, 662; *Campbell v. Rankin*, 664.

9. Title draws after it possession of property not in adverse possession of another. *Moore v. Douglass*, 662.

10. Actual possession of a part under a *bona fide* claim to the whole, is possession of the whole, or so much thereof as is not in the adverse possession of others. *Id.*

11. In such case, the party in possession of such part, may maintain an action of unlawful entry and detainer against one who enters on the residue without any right of entry, but the owner of such residue may enter on and hold the same without force. *Id.*

12. **TITLE BY ADVERSE POSSESSION**, 209.

PRACTICE. See **EQUITY**, 41, 43, 46.

PRESCRIPTION. See **NUISANCE**, 2.

Prescriptive enjoyment of light and air. *Note to Bryant v. Lefevre*, 787.
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PRESUMPTION. See **COMMON CARRIER**, 3, 4; **EASEMENT**, 2; **HUSBAND AND WIFE**, 7; **INSURANCE**, 25; **NEGLIGENCE**, 28; **OFFICE AND OFFICER**, 6; **WILL**, 8.

1. A person not heard of for seven years is presumed to be dead. But that presumption is not conclusive. *Davie et al. v. Briggs*, 266.

2. If it appears that the absent person, within the seven years, encountered some specific peril, which might reasonably be expected to destroy life, the court or jury may infer that life ceased before the expiration of the seven years. *Id.*

3. Where a person is not heard of for seven years, there is no presumption as to the time of death, but only that he is then dead. *Id.*

PROBATE COURTS.

1. The county court has jurisdiction only in the administration of the estates of dead persons. *Melia v. Simmons*, 134.

2. Administration of the estate of a person who, though represented to have deceased, is still alive, is absolutely void, and an occupation for ten years under claim founded upon such administration would not bar an action for the land. *Id.*

PROHIBITION.

Writ does not lie to arrest a proceeding at law for defect of parties. *Bowman's Case*, 270.

PROMISSORY NOTE. See **BILLS AND NOTES**.

PUBLIC POLICY. See **EQUITY**, 39; **EXECUTION**, 1; **INSURANCE**, 17; **OFFICER**, 11; **REWARD**, 1.

PUBLIC SCHOOLS. See **TAX AND TAXATION**, 2.

1. The teacher, unless restrained by some affirmative action of the board of education, has authority to enforce obedience to his lawful commands, and may, in a proper case, suspend a pupil from the privileges of the school. *State ex rel. Burpee v. Burton*, 233.

2. The decisions of the department of public instruction are entitled to great weight, and should never be overruled unless clearly contrary to law. *Id.*

3. Whether a writ of mandamus can issue to compel the teacher to reinstate a suspended pupil, *quere*. *Id.*

4. Extent of teacher's authority discussed. *Id. Note*.

RAILROAD. See **ACTION**, 9; **COMMON CARRIER**, 4; **CONSTITUTIONAL LAW**, 9, 20; **EQUITY**, 31; **EVIDENCE**, 8; **MASTER AND SERVANT**, 6, 9; **NEGLIGENCE**, 1, 4, 13, 17; **SALE**, 1; **SPECIFIC PERFORMANCE**, 1; **TAX**, 8.

1. Railroad company not liable for drugs furnished on order of division superintendent to a person injured on the road without proof of the authority of the superintendent to give the order. *Brown v. Railway Co.*, 63.

2. Where a railroad is authorized to use steam locomotives, no inference of negligence arises from the causing of an injury by sparks from such locomotives. *Ruffner v. Railroad Co.*, 134.

3. When a drunken, unruly, boisterous passenger endangers by his acts the lives of people, it is the duty of a conductor to remove such a passenger from the train. *Railway Co. v. Valleley*, 206.

4. But he must not inflict wanton or unnecessary injury upon the offending passenger, nor needlessly place him in peril. *Id.*

5. If having exercised reasonable prudence, the conductor expels such passenger, who is afterward run over and killed, the expulsion itself is not such proximate cause of the death as will make the company liable. *Id.*

6. Purchase of a ticket does not give passenger a right to stop over at intervening station without the consent of the company. *Stone v. Railroad*, 270.

7. A passenger who refuses to pay his fare becomes a trespasser, and may be ejected from the train. *Id.*

8. By refusal to pay his fare the passenger deprives himself of the right to insist upon courteous treatment. *Id.*

9. Testimony to the effect that the plaintiff had been permitted at other times to stop over at intervening stations, *held* inadmissible. *Id.*

10. Where a passenger has been ejected for non-payment of fare, he must

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pay the fare from the station where he first entered before he can insist upon being carried forward upon the same train. *Stone v. Railroad*, 270.

11. That the passenger attempted to re-enter the train with good intent, and without a purpose to defraud the company, would not aid him. *Id.*

12. A law of New York authorized railroads having continuous lines to consolidate, and a law of Connecticut provided that whenever a railroad, lying within both states, should consolidate with another road, under the laws of New York the new company should possess all the rights of the old. A railroad lying within both states was consolidated with another road, but the lines of the two roads were not continuous. *Held*, 1. That a subsequent Act of New York recognising the new corporation validated the consolidation. 2. That this ratification satisfied the requirements of the Connecticut act. *Mead v. Railroad Co.*, 453.

13. The new corporation succeeded to the power of the old one to issue bonds for completing the road and to mortgage its property. *Id.*

14. And this power included the power to issue bonds in exchange for bonds previously issued by the old company. *Id.*

15. A bill in equity alleged that the new corporation duly issued its bonds and disposed of them to *bona fide* holders: *Held*, a sufficient averment that the bonds were lawfully issued. *Id.*

16. After the bonds were issued, but before the mortgage was recorded, a creditor with knowledge of these facts, levied an execution upon the mortgaged property: *Held*, that he obtained no priority. *Id.*

17. A court of chancery has jurisdiction for the foreclosure of such a mortgage, although embracing property out of the state. *Id.*

18. A court of chancery may make a decree respecting property situated out of the jurisdiction. *Id.*

19. Negligence by a railroad does not relieve a person attempting to cross its track from exercising ordinary care and prudence. *Blaker's Ex'r, v. Receivers, &c.*, 562.

20. If it appears that the negligence of the person killed materially contributed to the disaster, his next of kin cannot recover. *Id.*

21. If one approaching a railroad fails to look and listen, or if seeing an approaching train he tries to cross and fails, the company is not liable. *Id.*

22. The duty of a person approaching a railroad to stop, look and listen, discussed. *Id. Note.*

23. Where a railroad enters upon land and lays its track before making compensation to the owner, the latter is not entitled to have the damages estimated by the value of the land, including the road-bed, ties, &c. *Greve v. St. Paul & Pacific Railroad Co.*, 702.

24. The above decision criticised, and the authorities reviewed. *Id. Note.*

25. Liable for injuries to passenger by its train, even though his ticket had not been issued by them, but by another railroad over which it had running powers. *Foulkes v. Met. Dist. Railway*, 733.

RAPE. See CRIMINAL LAW, IX.

REBELLION. See CONFEDERATE STATES; CONSTITUTIONAL LAW, 13.

RECEIVER. See EQUITY, 31.

1. Property vested in a receiver by the law of the state where it is situated will not be divested by the law of another state, into which he takes it in the performance of his duty. *Pond v. Cooke*, 134.

2. And where such property is attached in the state to which it is taken a party giving a receipt to the officer serving the attachment is not liable, even in nominal damages in a suit on the receipt for refusal to deliver. *Id.*

3. A receiver appointed by a court in such a case stands in the same position as an assignee or trustee in insolvency. *Id.*

4. On the appointment of a receiver of an insolvent corporation, its title to its property is divested by law. *Board of Freeholders v. State Bank*, 270.

5. The title of a receiver to property attaches from the date of his appointment, and is not deferred until he gives bond. *Maynard v. Bond*, 270.

6. A receiver cannot be sued or garnished without leave of the court. *People ex rel. v. Brooks*, 398.

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7. A foreign receiver with power to take property, wherever situate may sue for such property in the courts of New Jersey. *Hurd v. Elizabeth*, 591.
8. This is the rule whenever the creditors of the person represented by the receiver do not intervene. *Id.*
9. A court of chancery may, under certain circumstances, appoint a receiver of the rents of mortgaged premises pending foreclosure proceedings. *Haas v. Chicago Building Society*, 733.

RECORD. See **COURT**, 1; **EVIDENCE**, 5, 30.

REMOVAL OF CAUSES.

1. A petition for the removal of a suit in equity to the United States Circuit Court, with accompanying bond, was filed in a state court during a term in which the bill was filed, but subsequently to the filing of the answer and the appointment of a receiver: *Held*, that the petition was filed in time under the Act of Congress of 3d March 1875. *Taylor v. Rockefeller*, 298.
2. No order or allowance of the state court for a removal of the cause is necessary under that act. *Id.*
3. The jurisdiction of the state court is not ousted, unless the petition and record show a case of which the United States court has jurisdiction; but the judgment of the state court to that effect is not binding upon the United States court. *Id.*
4. Any cause which might have been commenced in the Circuit Court, may be removed from a state court. *Id.*
5. *Seem*, that the federal courts have jurisdiction where some of the indispensable parties on either side are citizens of the same state as that of some of the indispensable parties on the other side. *Id.*
6. *Seem*, that, prior to the Act of 1875, no removal could be had, unless each of the plaintiffs could have sued each of the defendants in the federal court. *Id.*
7. But under that act the power of removal may be enjoyed where in a suit there are several controversies of which one is wholly between citizens of different states, and can be fully determined as between them. *Id.*
8. Upon the question of citizenship, the court looks to the citizenship of the trustee, not of the *cestui que trust*. *Id.*
9. *Seem*, that the "controversy" mentioned in the Act of 1875, between the petitioners and the opposite party, need not be the main controversy in the case. *Id.*
10. A controversy wholly between citizens of different states, fully determinable as between them, entitles either of such parties to removal, though not fully determinable as between the remaining parties. *Id.*
11. The Circuit Court, upon such removal, obtains jurisdiction over the whole cause. *Id.*
12. Removal of causes under Act of 3d March 1875, discussed. *Id. Note.*
13. A cause can be removed after a new trial has been granted in the state court. *Railway Co. v. McKinley*, 462.

REPLEVIN. See **CONFLICT OF LAWS**, 2; **MORTGAGE**, 16.

A receiptor of goods attached, who by his receipt has bound himself to return them, has a special property in them, and can maintain replevin. *Peters v. Stewart*, 331.

RESCISSION. See **CONTRACT**, 10; **FRAUD**, 8; **VENDOR AND PURCHASER**, 9, 14.

REWARD.

1. Where a reward is offered for information leading to the apprehension of a felon, a police constable, to whom the felon has voluntarily offered to surrender himself, is not entitled to the reward. *Bent v. The Bank*, 291.
2. *England v. Davidson*, 11 A. & E. 856, commented upon. *Id.*
3. Right of officers to take reward when acting solely under their official authority. *Id. Note.*

RIPARIAN RIGHTS. See **WATERS AND WATERCOURSES**, 1, 8, 9.

Where a navigable river was meandered in making the public surveys and the United States has granted the land bounded by the meander line, the

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grantee takes to the river. Accretions to such land belong to him and cannot be selected by others as swamp and overflowed land. *Minto v. Delaney*, 733.

RIVER. See **RIPARIAN RIGHTS.**

SALE. See **CONSTITUTIONAL LAW**, 2; **CONTRACT**, 2; **DEBTOR AND CREDITOR**, 13; **FRAUDULENT CONVEYANCE**, 1; **HUSBAND AND WIFE**, 48; **STOPPAGE IN TRANSITU**, 1; **TAX AND TAXATION**, 1; **VENDOR AND PURCHASER**.

1. Plaintiff being interested as a bondholder in the completion of a railroad bought timber on his private account in order to have it ready when wanted by the railroad. Subsequently, contractors for the building of the road and the furnishing of the material applied to him for the timber, which he delivered to them. No terms were agreed upon, nor was it stipulated that the timber was to be used for the railroad, but both parties so understood. While the contractors were transporting the timber it was attached by creditors of the railroad. *Held*, that the transaction was a sale to the contractors, and that plaintiff could not maintain replevin. *Colegrove v. Snow*, 135.

2. Upon a sale of a specified quantity of goods from a mass, identical in kind and uniform in value, a separation of the quantity sold is not necessary to pass the title; otherwise, where the articles composing the mass are of different qualities and values. *Hurff v. Hires*, 161, and *Note*.

3. A purchaser of a number of articles not obliged to accept any unless all be delivered. *Hausman v. Nye*, 194.

4. Whether a delivery of goods to a common carrier not designated by the purchaser is sufficient to transfer the title, *quære*. *Id.*

5. If a vendee of corn under an agreement, that if it does not prove to be of grade No. 2, the title is not to pass, sells the same after it is rejected as No. 2, he will be liable for the price received by him. *Burns v. Mays*, 591.

6. Plaintiffs contracted to sell "twenty-five tons (more or less) Penang pepper * * name of vessel or vessels * * to be declared within sixty days." Within that time plaintiffs declared twenty-five tons by a vessel, but only twenty tons complied with the terms of the contract, and made no further declaration. *Held*, that it was an entire contract, and the vendees were not bound to accept the twenty tons. *Reuter v. Sala*, 734.

7. In the absence of fraud on the part of an executor to induce the purchase of land of his testator, the rule of *caveat emptor* applies in all its strictness. *Bond v. Ramsey*, 791.

SALVAGE. See **ADMIRALTY**, IV.**SAVINGS BANK.** See **CORPORATION**, 2.**SCHOOL.** See **PUBLIC SCHOOLS**.**SERVANT.** See **MASTER AND SERVANT**.**SET-OFF.** See **FORMER ADJUDICATION**, 5; **PAYMENT**, 1.

1. The assignee of a judgment with notice that the judgment-debtor had an unsettled demand against the plaintiff, but without notice of an equitable right to have it set-off, will be protected. *Ulman v. Kline*, 206.

2. Joint-debts cannot be set-off against separate debts, unless there be some special equity. *Bank v. Hemingray*, 462.

3. If there is such equity, the bankruptcy of the party against whom they exist, is sufficient ground for the allowance of the set-off. *Id.*

4. In an action on a note which the plaintiff holds as collateral security for a loan to the insolvent payee, against whom the maker is entitled to an equitable set-off, the plaintiff can only recover the amount of the debt, and not the amount of his attorney's fees. *Id.*

5. A plaintiff cannot fix the amount of a contested bill by giving credit for what he claims it should be. *McEwen v. Bigelow*, 526.

6. A defendant can withhold his claim of set-off to be litigated in another suit. *Id.*

7. A judgment recovered before one justice can be ascertained and applied by another in satisfaction of a counter claim recovered before him. *Id.*

SHERIFF AND SHERIFF'S SALE. See **EXECUTION**, 1, 5, 6, 8.

1. A sheriff's deed good upon its face cannot be collaterally assailed after the lapse of half a century because the sale was made on a day different from that advertised, there being no evidence of fraud or to connect the purchaser with the mistake. *Houk v. Cross*, 135.

2. A sheriff agreed that his private debt should be set-off against a note given for the purchase-money of land sold by him as sheriff. The parties entitled to the proceeds of the land treated the note as paid, and compelled the sheriff's sureties to pay them the money. *Held*, that the sureties could not recover against the maker of the note. *Sweet v. Jeffries*, 272.

3. Where moneys belonging to execution-creditors are deposited in bank by him as sheriff, and are attached by his individual creditors, he may interplead to protect the fund as trustee for those entitled to the money. *Meadowcroft v. Agnew*, 734.

4. Where the proceedings on an execution are in substantial compliance with the law, the sale, though somewhat informal, is good, and will protect the purchaser without a change of possession. *Fitzpatrick v. Peabody*, 791.

SHIPPING. See **ADMIRALTY**.

1. A shipowner who charters his vessel, is impliedly bound to see that she is seaworthy, and to keep her in proper repair. *Work v. Leathers*, 63.

2. But a breach of this contract will not relieve the hirer from paying for the use he makes of the vessel. *Id.*

3. The contract of a shipmaster to carry to a certain port, means that he is to bring his vessel to some wharf or convenient place of discharge. *Hodgdon v. Railroad Co.*, 327.

4. The master of a vessel arrived in port, but could not reach any wharf for some days, on account of ice: *Held*, that he was not entitled to demurrage. *Id.*

5. The fact that the consignees broke a passage for other vessels did not entitle this master to demand the same help. *Id.*

SLANDER. See **TRIAL**, 2.

1. Words falsely and maliciously charging a public officer with ignorance and incapacity to perform the duties of an office of profit, and directly tending to injure him therein, are actionable *per se*. *Spiering v. Andrae*, 186.

2. When charge of incapacity in office amounts to slander. *Id. Note*.

3. It is sufficient if the *gravamen* of the charge be proven. *Dufresne v. Weise*, 398.

4. Where, the proof was that defendant used words of similar import to those charged, though not quite the exact words, the variance was immaterial. *Id.*

5. Words falsely charging an act criminal by the law of the place of the act are slanderous *per se*, although the act be not criminal by the law of the place of speaking. *Id.*

6. Where words are actionable *per se*, pecuniary loss is presumed. Where they are not it is necessary to prove special damage. *Shafer v. Ahalt*, 462.

7. Words charging an offence are not actionable *per se* unless the offence subjects the party to corporal punishment. *Id.*

8. Special damage is that which is the natural consequence of the slander, and not such as is occasional and accidental, such as sickness. *Id.*

SMUGGLING. See **STATUTE**, 6.**SPECIFIC PERFORMANCE.** See **EVIDENCE**, 19; **TRUST AND TRUSTEE**, 13.

1. Specific performance refused of a contract to build a railroad, although the estimates, &c., were to be made by the railroad, and the payments were to be made in its stocks and bonds, the railroad having refused to carry out the contract solely, as it alleged, because of its inability to comply with a supplement to the act of incorporation, the penalty for non-compliance being a forfeiture of its charter. *Dunforth v. Railroad Co.*, 206.

2. The court refused to consider the constitutionality of the supplement, or to direct the railroad to make estimates for the work already done. *Id.*

3. Where a vendor of real estate agrees that if a certain street be not

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opened in two years, he will, upon a reconveyance, refund the money, a court of equity will specifically enforce this agreement. *Kerfoot v. Breckinridge*, 206.

4. Where the wife has not joined in the contract, it is erroneous to decree specific performance by her. *Muthison v. Wilson*, 335.

5. The insolvency of a purchaser who was to give a mortgage for part of the purchase-money, but who offered to pay the whole in cash if desired, is no defence against specific performance. *Hughes v. Young*, 788.

6. Where the person through whom plaintiff claims, could not claim specific performance, the plaintiff cannot do so without showing that he is a *bona fide* purchaser. *Berry v. Whitney*, 463.

7. Stipulations not actually made, and to which the parties might not have assented, cannot be imported into a contract. *Nims v. Vaughn*, 591.

8. Where a demand has once been made and refused, it is not necessary to repeat it before suit. *Id.*

9. Will not be refused as inequitable because of the fluctuation of values, where the court has no means of knowing what bearing the contract had on the negotiations of the parties. *Id.*

10. Generally, when a contract respecting real property is unobjectionable, equity will decree specific performance. But the court may, under certain circumstances, refuse its aid, or it may rescind the contract. *W. Va., O. & O. L. Co. v. Vinal*, 662.

11. When general rules and principles will not furnish any exact measure of justice, the court will withhold or grant relief according to the circumstances of each case. *Id.*

12. In the case of parol contracts for land, partly executed, it is the duty of the court to exert proper means to ascertain the terms of the contract. *Id.*

13. Should be decreed of a contract between father and son, that if the son would enter upon and improve certain land, the father would make him a deed for it, in pursuance of which the son enters on the land. *Lorentz v. Lorentz*, 663.

14. Such contracts must be established by clear, definite and certain proof. *Id.*

15. Not extended to contracts relating to other matters than conveyance of land. *Brittain v. Rossiter*, 716.

16. A parol contract for sale of land will not be enforced unless explicit, nor unless the boundaries of the land are already defined. *Brown v. Lord*, 734.

17. If possession is relied on to enforce parol agreement, it must have been visible, notorious and exclusive, and taken under the agreement. *Id.*

STATUTE. See CONSTITUTIONAL LAW, 30; CRIMINAL LAW, 39; TAX AND TAXATION, 2.

1. Even if two statutes on same subject be not in terms repugnant, if the later statute is clearly intended to prescribe the only rule which should govern the case provided for, it will repeal the earlier act. *State v. The Mayor, &c.*, 20, and *Note*.

2. This rule applied to municipal ordinances. *Id.*

3. A legislative grant of a privilege to one person not repealed by an act giving all others the same right under certain conditions. *State v. Cleland*, 63.

4. An act was passed in 1872. A revision in 1875 repealed all public laws not contained therein, except acts which, though public in form, were of a private nature. This act was not contained in the revision. By an established custom the acts of each year were published by the secretary of state in two pamphlets, one called "Public Acts" and the other "Private Acts and Resolutions." This act was published among the private acts for the year 1872. *Held*, that it was to be presumed that the legislature acted with reference to this usage and classification, and intended to preserve the act in question. *State v. Sargent*, 243.

5. Statutes in derogation of the common law are to be so construed as not

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to infringe upon the principles of the common law to any greater extent than is plainly expressed. *State v. Clinton*, 271.

6. An action of debt cannot be maintained by the United States for penalties prescribed by the Act of Congress to prevent smuggling, approved July 18th 1866. That act contemplated only a criminal proceeding. *United States v. Clafin*, 271.

7. Nor does section 3082 of the Revised Statutes authorize a civil action. *Id.*

8. A recital in a statute that a former statute had been repealed, is not conclusive. *Id.*

9. When a new statute covers the whole subject-matter of an old one, the latter operates by way of substitution, and the former is impliedly repealed. It is, however, necessary that the objects of the two statutes are the same. If not, both statutes will stand, though they refer to the same subject. *Id.*

10. Where a statute creates a new offence and provides a remedy by a particular method of proceeding, that method must be preserved. *Commissioners, &c., v. Bank of Findley*, 526.

11. An Ohio statute provided that any one aiding in the loan of public moneys should be guilty of embezzlement and subject to imprisonment and a fine of double the amount embezzled, such fine to be a judgment in favor of the party injured, and to be collected as other judgments. *Held*, that this act created a new offence, and that the remedy therein given was exclusive of a civil action for the same offence. *Id.*

12. A statute exempting property from levy and sale, is not to be construed strictly. *Washburn v. Goodheart*, 591.

13. In construing a statute, aid may be derived from attention to the state of things as it appeared to the legislature when the statute was enacted. *Pratt v. Union Pacific Railroad Co.*, 663.

14. In considering what cases fall within a statute, the intention of the makers governs. *Brown v. Gates*, 734.

15. The repeal of an ordinance pending a prosecution under it releases the defendant. *City of Kansas v. White*, 735.

16. When an act is repealed without a saving clause, it must be considered as to future transactions as if it had never existed. *Curran v. Owens*, 735.

17. A right of action depending solely upon statute, falls with the repeal of the statute, unless it has been carried into judgment. *Id.*

18. Whether the repealing act was intended to affect pending suits, must be gathered from the repealing act itself. *Id.*

19. If the section in the old act which gave the right of action is substantially re-enacted in the repealing statute, suits brought thereon are saved. *Id.*

STOPPAGE IN TRANSITU.

1. Delivery of goods by the vendor to a carrier, even though the carrier be hired by the purchaser, is only constructive delivery to the purchaser. *Ex parte Rosevear Clay Co.*, 791.

2. Till the goods are in the actual possession of the purchaser the transit is not at an end, and it makes no difference that their ultimate destination has not been communicated by the purchaser to the vendor. *Id.*

STREAM. See EQUITY, 22; RIPARIAN RIGHTS; WATERS AND WATER-COURSES.

STREET. See MUNICIPAL CORPORATION, 4, 10, 13, 19, 29, 30, 31, 32.

SUBROGATION. See INSURANCE, 9.

1. A first mortgagee, who pays taxes upon the faith of a promise by a second mortgagee to repay him, cannot, as against the second mortgagee, be subrogated to the original lien of the township for the taxes. *Manning v. Tuthill*, 207.

2. A mere volunteer, who pays another's debt, is not entitled to be subrogated to the creditor's rights, but if the person paying the debt does so for the protection of his own rights, the substitution should be made. *Young v. Morgan*, 792.

SUNDAY. See **CRIMINAL LAW**, 45; **INTOXICATING LIQUORS**, 1.

Whenever an act must be done in a given period, Sundays which fall within the period make a part of it; but if the period closes on Sunday, the act may be done on the following day. *Barnes v. Eddy*, 664.

SUPPORT.

1. The right of lateral support extends only to the soil in its natural condition, and does not protect whatever is placed on the soil, increasing its downward and lateral pressure. *Northern Trans. Co. v. Chicago*, 587.

2. **SUPPORT, LATERAL AND SUBJACENT**, 529.

SURETY. See **BANKRUPTCY**, 16; **GUARANTY; HUSBAND AND WIFE**, 49; **LIMITATIONS, STATUTE OF**, 3; **PARTNERSHIP**, 4, 8.

1. Surety on bond of officer not responsible for performance of duties not belonging to the office when the bond was signed, and not discharged by the addition of such duties. *Gausson, Ex'r, &c., v. United States*, 64.

2. Where an officer is required to perform a special duty, for which he gives a special bond, no liability therefor attaches to his general bondsmen. *Supervisors of Milwaukee v. Ehlers*, 136.

3. Where a principal takes sureties for his agent without disclosing to them his discovery of a previous default by the agent, he cannot recover from them. *Dinsmore v. Sidball*, 463.

4. Abandonment by creditor of a mortgage sufficient to secure his debt, will discharge a surety, and he may make this defence in a court of law. *Renegar v. Thompson*, 644.

5. Where facts, which, if known, might have deterred the surety, are, with the knowledge of the creditor, misrepresented to him, although not with a fraudulent purpose, he is not bound. *Warren v. Branch*, 735.

6. The creditor is not bound to disclose facts not connected with the suretyship unless the surety makes inquiry. *Id.*

7. If the creditor fraudulently conceals such facts, or has reason to believe that the principal must have used fraud, the surety is not bound. *Id.*

8. Distinction between guaranty and suretyship. *Note to Birdsall v. Heacock*, 757.

TAX AND TAXATION. See **CONSTITUTIONAL LAW**, 2, 14, 22; **EVIDENCE**, 12; **MUNICIPAL CORPORATION**, 5, 27; **PAYMENT**, 3; **SUBROGATION**, 1.

1. A state tax on the amount of an auctioneer's sales is a tax on the goods sold. *Cook v. Pennsylvania*, 57.

2. A provision in a constitution exempting from taxation property "necessary for school purposes," is more extensive than "for the use of schools." *Northwestern University v. The People*, 366.

3. The former includes property which is not itself in actual use by the school, but which, by being rented, produces an income for the support of the school. *Id.*

4. Exemption of corporations from taxation. *Id. Note.*

5. A surrender of the right of taxation is never to be presumed, but must be the result of express terms or necessary inference. *County Commissioners v. Sisters of Charity*, 399.

6. Exemption being a surrender of the power of taxation, is subject to the same principle. *Id.*

7. No general principle of law exempts charitable corporations from taxation. *Id.*

8. The charter of a railroad company provided, "that the said road or roads, with all their works, improvements and profits, and all the machinery of transportation used on said road, are hereby vested in the said company, incorporated by this act, and their successors for ever; and the shares of the capital stock of the said company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burden:" *Held*,

1. That the exemption from taxation was a contract between the state and the corporators, within the protection of the Constitution of the United States;

2. That the property and franchises of the company, and the gross receipts derived from the exercise of such franchises, were exempt from taxation. *State v. B. & O. Railroad Co.*, 464.

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9. The receipts from the road and from lateral roads, and from all necessary buildings and works, were exempt from taxation, whether constructed with money derived from the subscription to the capital stock, or from sales of the stock, or from money borrowed, or from the undistributed profits. *State v. B. & O. Railroad Co.*, 464.

10. Necessary buildings and works were such as were reasonably convenient and appropriate to the operation of the road. *Id.*

11. The elevators, wharves, piers and docks owned by the defendant were necessary for its business as a common carrier; but, as such common carrier, it had no right to use them for the storage of freight, after the consignee had had a reasonable time to remove the same. *Id.*

12. Hotels and buildings for the accommodation of passengers were necessary to the business of the road, and therefore within its charter, although not expressly authorized. *Id.*

13. Whoever claims a surrender of the power to tax, must show it in language that will admit of no other reasonable construction. *Hoge v. Railroad Co.*, 526.

14. The distinction between taxes and special assessments for benefits, has been so generally recognised that it must be considered as settled. *Brooks v. Mayor of Baltimore*, 589.

15. Chancery has jurisdiction to enjoin the collection of a tax. *Kimball v. Merchants' Sav. & L. Co.*, 736.

16. **TAXATION OF BONDS OR STOCK OF FOREIGN STATES, MUNICIPALITIES AND CORPORATIONS**, 1.

TELEGRAPH.

1. Under the Wisconsin statute, empowering the court to compel parties to allow inspection of papers, the court may order a telegraph company defendant to deposit in court for inspection originals of messages transmitted by them, duly verified. *Phelps v. Telegraph Co.*, 399.

2. **INVIOABILITY OF TELEGRAPHIC CORRESPONDENCE**, 65.

TENANT IN COMMON. See **HUSBAND AND WIFE**, 39.**TENDER.**

1. Tender after default does not discharge the lien of a mortgage. *Crain v. McGoon*, 179.

2. Such tender should be kept good. *Id.*

3. Distinction between mortgages and debts as to tender after default. *Id.*, *Note*.

4. Objection to the mode of tender must be made at the time of tender. *Browning v. Crouse*, 399.

5. A tender does not remain in force, if the payment is refused and received back. *Id.*

6. One who relies on a tender must pay the money into court. *Gilkeson v. Smith*, 736.

TIME.

A probate court appointed commissioners on an insolvent estate of decedent, and allowed six months for creditors to prove their claims: *Held*, that the commissioners must sit on the last day of the six months, and if that came on Sunday, they must sit the following day. *Barnes v. Eddy*, 664.

TITLE. See **EXECUTOR AND ADMINISTRATOR**, 3.**TORT.** See **PARTNERSHIP**, 5.**TRADE-MARK.**

1. So much of Title 60 of the Revised Statutes as relates to trade-marks is unconstitutional, a trade-mark not being a writing or discovery, nor its maker an author or inventor within the meaning of the constitution. *Leidersdorf v. Flint*, 37, and *Note*.

2. The word "Worcestershire," as applied to sauce, has become generic in meaning, and the fact that persons manufacturing a sauce by that name reside in Worcestershire, England, does not give them the sole right to such name. *Lea v. Deakin*, 322.

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3. Plaintiffs having known for many years that there was a sauce manufactured by other persons, to which this term was applied, and having taken no steps to prevent it, there may be said to have been something in the nature of an acquiescence. *Lea v. Deakin*, 322.

4. Application of name as a trademark. *Id.*, Note.

TRESPASS. See ACTION, 9; OFFICER, 10; POSSESSION, 8; RAILROAD, 23.

1. In trespass for an assault the provocation, though offered in evidence to justify the assault, may, if insufficient for that purpose, be considered by the jury in mitigation of damages. *Burke v. Melvin*, 335.

2. And it makes no difference that the plea is the general issue, with notice only that the facts would be proved as a justification. *Id.*

TRIAL. See EVIDENCE, 9; JURY, 2; NEGLIGENCE, 21; UNITED STATES COURTS, 15.

1. An admission in writing or of record made at first trial binding at another trial. *Holly v. Young*, 64.

2. In slander defendant offered evidence of the plaintiff's bad reputation. The court limited him to ten witnesses: *Held*, to be a ground for granting a new trial. *Ward v. Dick*, 464.

3. The party holding the affirmative of an issue ought to open and close, and if plaintiff hold the affirmative of any one of a number of issues, he ought to begin. A liberal discretion, however, is allowed to the court on this question, and this will not be reviewed except upon plain error. *Montgomery v. Scindler*, 526.

4. Where there is only a *scintilla* of evidence, the case should be taken from the jury. *Conely v. McDonald*, 592.

5. Where the evidence has a legal tendency to make out a proper case, its weight and sufficiency, however slight, is a question for the jury. *Id.*

TROVER.

1. A judgment in trover, without satisfaction, does not pass the title of the property to the defendant. *Atwater v. Tupper*, 271.

2. Plaintiff brought two actions of trover against A. and B., who had severally and successively converted the property. He obtained judgment against A.: *Held*, to be no bar to the maintenance of the suit against B. *Id.*

3. And *held*, that the judgment was to be for the full value of the property. *Id.*

4. The value of the property had been found upon a hearing on the general issue before the filing of the plea in bar of the further maintenance of the action. Plaintiff demurred to that plea, and the court sustained the demurrer. The defendant then claimed the right to be heard upon the question of damages: *Held*, that he was not entitled to a further hearing. *Id.*

TRUST AND TRUSTEE. See BILLS AND NOTES, 2; COLLATERAL SECURITY, 1; CORPORATION, 10; EQUITY, 41; JUSTICE OF THE PEACE, 1; LIMITATIONS, STATUTE OF, 6.

1. Grantee of land retaining the purchase-money as indemnity until encumbrance is removed, is a trustee of the money for the vendor, and chargeable with interest for its use. *McCrea v. Martien*, 64.

2. All the power, influence and skill of one occupying a relation of trust is to be used for the advantage of the beneficiary, and all profits and increase belong to the latter. *Berkmeyer v. Kellerman*, 202.

3. Although a trustee has no right to settle a debt due him as trustee by cancelling one due from himself to the debtor, yet if the *cetui que trust* adopts the settlement, and compels the sureties of the trustee to make good the amount to him, they cannot afterward recover it of the original debtor. *Sweet v. Jeffries*, 272.

4. A purchaser of land died without completing his payments, and the vendor without manifesting any intention of enforcing a right of forfeiture resold one-half of the land to a third person, and one-half to the widow of the purchaser for the balance due, which was less than the value of the land. *Held*, that the widow took the title in trust for her husband's heirs. *Musham v. Musham*, 336.

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5. A trustee has no power to sell trust property for his own use, and a purchaser with notice acquires no title. *Third National Bank v. Lange*, 382.

6. Implied trust may be proved by parol. *Newton v. Taylor*, 527.

7. An implied or constructive trust may be established from the acts of a party who has obtained money upon the faith of his agreement to buy lands in the name of his wife, and, having bought them, takes the title to himself. *Id.*

8. A husband, so receiving money, is an agent for the wife, and by taking the deed to himself becomes a trustee *ex maleficio*. *Id.*

9. Where one accepts notes of another in trust to pay such person's debt, and agrees with the creditor to either turn over the note to him, or when collected to pay him the money, he makes himself a trustee for the creditor, even though he receives no compensation. *Walden v. Karr*, 527.

10. Where a conveyance is obtained for fraudulent ends, the party deriving title may be converted into a trustee. *Huxley v. Rice*, 592.

11. K. sold to H. a parcel out of a lot which he had mortgaged, and then allowed the mortgage to be foreclosed, and by a collusive arrangement with R., caused the lot to be bid in by R. Held, that R. should be considered as trustee for H.'s benefit. *Id.*

12. Where a party makes another trustee of notes, not only for her own benefit, but also for the benefit of the makers of the notes, the trustee being one, she cannot revoke the same, nor will a court of equity revoke it where there is no abuse of the trust. *Light v. Scott*, 592.

13. Upon a purchase by a father with his funds in the name of the son, there is no resulting trust in the father, and the son may compel specific performance. *Lorentz v. Lorentz*, 736.

14. A trustee is at liberty to apply for his release from the trust, on the sole ground of unwillingness to act. *Green v. Blackwell*, 792.

15. The fact that he is one of two trustees, and that the deed of trust provides that, in case of the death of one, the survivor shall appoint a new trustee, will not induce the court to refuse the release. *Id.*

16. That a very large and unexpected addition to the trust estate has been made, is in itself, a good reason for releasing an unwilling trustee. *Id.*

TUG. See ADMIRALTY, 5.

ULTRA VIRES. See CORPORATION, 2.

UNDUE INFLUENCE. See DEED, 1; EQUITY, 14; WILL, 4, 9.

UNITED STATES. See ASSIGNMENT, 1; CONSTITUTIONAL LAW, I; EQUITY, 25; LIMITATIONS. STATUTE OF, 14.

1. Where the United States has leased property, public officers can only agree to pay the rental, provided the money is appropriated by Congress. *Bradley v. United States*, 396.

2. Where the lessor has been notified that he would not be paid any greater rent than the sum appropriated, he can only recover such sum. *Id.*

3. Is not estopped by a judgment in ejectment against its tenants or agents. *Carr v. United States*, 528.

4. Without an Act of Congress, no direct proceedings will lie at the suit of an individual against the United States or its property; and no officer of the government can waive this privilege. *Id.*

5. When it becomes apparent by the pleadings or the proofs that the possession assailed is the possession of the government by its agents, the jurisdiction of the court ought to cease. *Id.*

6. The cases in which the property of the government may be subjected to claims against it are those in which the property is in juridical possession by the act of the government itself, or has become so without violating its possession, and it seeks the aid of the court to establish or reclaim its rights, in such cases the prior rights of others to the same property should be adjudicated and allowed. The cases of *The Siren*, 7 Wall. 152, and *The Davis*, 10 Id. 15, cited and approved. *Id.*

UNITED STATES COURTS. See **BANKRUPTCY**, 1, 2, 3; **ERRORS AND APPEALS**, 2; **JURISDICTION**, 5.

1. The rule established by statute or decision in any state as to the order in which mortgaged property, sold at different times to different purchasers, shall be subjected to the mortgage will be followed by the federal courts sitting in such state. *Oreis v. Powell*, 60.

2. Where jurisdiction depends upon the citizenship of the parties, the facts to support that jurisdiction need not be averred in the pleadings, but must be shown by the record. *Robertson v. Cease*, 207.

3. The record includes only papers properly inserted in the transcript. *Id.*

4. Citizenship and residence are not synonymous terms. *Id.*

5. Neither the language nor policy of the 14th amendment supports the position that the bare averment of residence is sufficient to show jurisdiction. *Id.*

6. A citizen of Tennessee filed a bill in the Circuit Court against a citizen of Ohio to compel a re-transfer of shares in the Memphis Gaslight Co., which complainant alleged had been fraudulently transferred by respondent from complainant's name to his own upon the corporation books. *Held*, that the Circuit Court had no jurisdiction, because the gaslight company was an indispensable party. *Kendig v. Dean*, 265.

7. Where the decision of an inferior court of a state, was solely on a point which would give jurisdiction to the United States Supreme Court, it will not be presumed that the State Supreme Court decided the case on another ground not found in the record. *Keith v. Clark*, 336.

8. While the prayer for judgment usually fixes the amount in dispute, yet if the actual amount otherwise appears in the record, reference may be had to that for the purpose of determining jurisdiction. *Gray v. Blanchard*, 400.

9. Where the decision is upon principles of general law, and it nowhere appears in the record that the plaintiff claims any right, under the constitution or authority of the United States, the Supreme Court has no jurisdiction. *Bank of Old Dominion v. McVeigh*, 400.

10. It is not enough for a record to show that a federal question was argued. It must appear that it was decided, or that the judgment could not have been given without deciding it. *The State ex rel. v. Board of Liquidation*, 400.

11. Where the court decided that as between vendor and vendee there could be a sale and delivery of cotton, so as to pass title to the vendee before the payment of the government tax. *Held*, that no federal question was involved. *Carson v. Ober*, 400.

12. The judgment of the highest court in a state that a statute is in accordance with the state constitution, is conclusive upon the U. S. Supreme Court. *Railroad v. Georgia*, 452.

13. The courts of the United States take judicial notice of the laws which formerly prevailed in countries acquired by the United States. Such laws are not deemed foreign laws, but the laws of an antecedent government. *United States v. Askew*, 586.

14. A suit between citizens of the same state cannot be sustained in a Circuit Court of the United States where there is no denial of the plaintiff's patent, where its use is admitted, and where a subsisting contract governs the rights of the parties. *Hortel v. Tilghman*, 592.

15. Circuit Courts cannot order a nonsuit, but may, at the close of plaintiff's case, direct a verdict for defendant if they are of opinion that, in view of the evidence and of all inferences therefrom, the jury would not be warranted in finding a verdict for plaintiff. *Congress Spring Co. v. Edgar*, 613.

USAGE. See **CONSTITUTIONAL LAW**, 35; **CUSTOM**, 1; **EVIDENCE**, 33; **MINES**, 2.

USURY. See **NATIONAL BANKS**, 2, 4.

1. The extension of time of payment of a loan is a loan of money within the meaning of a statute, and where the sureties upon a note executed a new note for the consideration of the extension of time upon the original undertaking, the transaction was held to be usurious. *Kendig v. Dean*, 64.

2. Although by the terms upon which a defendant is let in to answer he cannot set up usury, yet if usury be proved the complainant can only recover the amount equitably due. *Powers v. Chaplain*, 207.

USURY.

3. One of two executors loaned moneys of the estate, reserving usury thereon for his own use. *Held*, that such usury could be set up as a defence in a suit by the executors. *O'Neil v. Cleveland*, 272.

4. An agent procuring a loan received from the borrower five per cent. and \$100 for expenses, the lender having no knowledge of and deriving no benefit from this payment. *Held*, that it was not usury. *Ballinger v. Bowland*, 336.

5. The right to recover back usurious payments is a personal one, and cannot be enforced by a purchaser of property subject to a debt drawing usurious interest. *Spaulding v. Davis*, 792.

VARIANCE. See CRIMINAL LAW, 8; LIBEL, 7.

VENDOR AND PURCHASER. See ASSUMPSIT, 1, 2; ESTOPPEL, 1; FRAUD, 1, 3; MORTGAGE, 15, 19; SALE; TRUST AND TRUSTEE, 1.

1. A vendor of land received the vendee's check for a cash payment, but did not present it for four weeks. Two weeks after the sale the vendee withdrew his funds from the bank: *Held*, that the vendee retained an equitable lien on the land for the amount of the check. *Madden v. Barnes*, 136.

2. A vendor gave bond to give a deed on a certain day if the purchase-money was then paid: *Held*, that the making of the deed and the payment of the money were concurrent acts, and if the vendor could not make title at the appointed time, and the vendee was ready to pay, the latter can recover back the money already paid. *Clark v. Weis*, 208.

3. Upon a bill to enforce a lien for purchase-money where there has been no fraud and no eviction, the vendee cannot controvert the title of the vendor, and no one claiming an adverse title can be permitted to bring it forward and have it settled in that suit. *Peters v. Bowman*, 272.

4. In such cases, the vendee must rely upon the covenants of title in the deed of the vendor. *Id.*

5. Where at the time of the conveyance with warranty, there is adverse possession under a paramount title, such possession is regarded as eviction, and involves a breach of this covenant. Where the paramount title is in the warrantor, and the adverse possession is tortious, there is no eviction. *Id.*

6. The covenant of good right to convey is synonymous with the covenant of seisin. The actual seisin of the grantor will support both. *Id.*

7. These covenants, if broken at all, are broken when they are made. They are personal, and do not run with the land. *Id.*

8. A transfer of his bid by a bidder at public sale is valid, if there be no fraud and no loss to the mortgagor. Even if objectionable, it cannot be set up in an action of ejectment against remote purchasers without notice. *Johnson v. Watson*, 335.

9. A vendee of land, who has paid the price and taken possession, cannot maintain an action to recover back the purchase-money, without giving up possession. *Long v. Saunders*, 528.

10. The taking of bond and personal security for purchase-money is not a waiver of vendor's lien, unless it is shown that the security alone was relied on. *Warren v. Branch*, 664.

11. Before the passage of the West Virginia statute, requiring an express reservation of this lien in the deed, the execution of the deed and the taking of personal security would amount to a waiver. *Id.*

12. A vendor who has taken the sole mortgage of his vendee, a married woman, in part payment of the purchase-money, is in equity, as against her, entitled to a lien for such purchase-money. *Kent v. Gerhard*, 736.

13. A buyer is under no obligation to disclose the fact that he is purchasing for another. *Hughes v. Young*, 788.

14. To resist payment of the purchase-money for fraud, the purchaser must elect to rescind the contract, and it is doubtful whether this can be done by his grantees after his death. *Bond v. Ramsey*, 792.

15. ASSUMPTION OF ENCUMBRANCES BY THE PURCHASER OF LAND, 337, 401.

VERDICT. See **CRIMINAL LAW**, 43; **JUROR AND JURY**, 1.

1. Where, in a civil action for assault and battery, issue is joined as to the guilt of defendant, and whether the injury was occasioned by the plaintiff's own fault, a verdict that the jury "do find and say that the plaintiff is entitled to \$990 damages in the above case," is substantially a finding of the issue in favor of the plaintiff. *Shaul v. Norman*, 136.

2. In such action it is not necessary for the plaintiff to prove the assault and battery beyond a reasonable doubt. *Id.*

3. A juror will not be allowed to impeach his verdict by his affidavit that he would not have found the defendant guilty, if he had known that the punishment was death. *The State v. Shock*, 736.

VESSEL. See **ADMIRALTY**, 1, 2; **NEGLIGENCE**, 8, 9; **SHIPPING**, 1.**VOLUNTARY CONVEYANCE.** See **DEBTOR AND CREDITOR**, 2.**WAGER.** See **CONTRACT**, 2, 8, 11.**WAIVER.** See **BILLS AND NOTES**, 7; **CRIMINAL LAW**, 26; **ESCAPE**, 3; **INSURANCE**, 22; **JURISDICTION**, 4; **MECHANICS' LIEN**, 1; **MORTGAGE**, 10; **VENDOR AND PURCHASER**, 10.

A waiver is an intentional relinquishment of a known right. The existence of such an intent is a matter of fact. *First Nat. Bank v. Hartford Ins. Co.*, 136.

WARRANTY. See **VENDOR AND PURCHASER**, 5.**WASTE.** See **MORTGAGE**, 16.**WATERS AND WATERCOURSES.** See **EQUITY**, 22; **HIGHWAY**, 5; **MINES**, 1; **NEGLIGENCE**, 7; **RIPARIAN RIGHTS**, 1.

1. The owners of land bounded on a harbor, own only to high-water mark. They have a right to construct wharves below that line, if they conform to the state regulations, and do not obstruct navigation. *State v. Sargeant*, 243.

2. The duty of protecting the right of navigation rests upon the legislature. *Id.*

3. They may vest in commissioners authority to restrain riparian proprietors from obstructing navigable waters. *Id.*

4. The enactment of such a law is not an exercise of the right of eminent domain. *Id.*

5. The Act of 1872, establishing a board of commissioners for New Haven harbor, gives the board power to prevent encroachments upon the harbor; authorizes them to prescribe harbor lines, make any structure in the harbor not approved by the commissioners a public nuisance, and authorizes the commissioners to bring suits to stop such erection. *Held*, 1. That the act was constitutional and valid. 2. That it was not necessary for the commissioners to establish a general harbor line, before forbidding or removing particular encroachments. *Id.*

6. The owner of land on which there is a watercourse, may receive the water in its natural channel, and use it, but must return it to its channel when it leaves his land. *Taylor v. Fickas*, 249.

7. The owner of land is the absolute owner of all water lying on the surface from rain-fall or the overflow of streams. And, he may fill up his land so as to prevent its being so overflowed. *Id.*

8. An owner of land on the Ohio river planted trees between his land and that adjoining, so as to arrest the drift-wood, and in times of overflow, to back up the water on the adjoining land. *Held*, that the adjoining owner had no cause of action. *Id.*

9. Where a stream was useful, both for domestic purposes and for watering stock, and defendant kept hogs on land bordering thereon, which fouled the stream and deprived a lower proprietor of its use for domestic purposes. *Held*, that it was for the jury to determine whether defendant's use was reasonable and proper. *Hazeltine, Adm'r, v. Case*, 663.

WAY. See **CONSTITUTIONAL LAW**, 41; **INJUNCTION**, 5.

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ERRATA.

Page 368, line 18. For "asserted" read "assumed."
Line 22. For "covering" read "governing."

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